Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ROSLYN EVERSON, RANDY FOX, STENNIS GEORGE, RICHARD IDEMUDIA, and BRENDA L. SEBASTIAN, and a class of all persons similarly situated,
Petitioners,

v.

STATE OF MICHIGAN DEPARTMENT OF CORRECTIONS and BILL MARTIN, individually and in his official capacity as Director of the Michigan Department of Corrections,
Respondents.

and

LINDA NUNN and TRACY NEAL,
Intervenor Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN R. RUNYAN *
ANDREW NICKELHOFF
MARSHALL J. WIDICK
SACHS WALDMAN, P.C.
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

I. Must an employer's assertion of a bona fide occupational qualification (BFOQ) under Title VII of the 1964 Civil Rights Act to justify its intentional gender discrimination be supported with proof showing that all or substantially all members of the excluded gender cannot safely and efficiently perform the job, or may the employer rely on the Age Discrimination in Employment Act's more lenient test of whether it is "impossible or highly impractical" to determine on an individualized basis which employees are not qualified?

II. In lieu of intentional job discrimination, must a corrections system employ the least discriminatory approach that balances the competing rights of employees and prisoners, and is the trial court's factfinding in reviewing such decisions entitled to deference under F.R.C.P. 52(a)?

PARTIES TO THE PROCEEDING

The caption of this case includes all parties to the proceeding in the courts below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND RULE INVOLVED	2
INTRODUCTION	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW ALTERS THE LEGAL STANDARD UNDER TITLE VII FOR PROVING THAT GENDER IS A BONA FIDE OCCUPATIONAL QUALIFICATION, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS	8
A. The Decision Below Conflicts With This Court's Decision In *International Union, UAW v. Johnson Controls, Inc.*, And The Decisions Of The Majority Of Circuit Courts After *Johnson Controls*	8
B. The Decision Below Also Conflicts With The Settled Law That A Corrections Employer Must First Strive To Rearrange Job Responsibilities In Order To Accommodate Both Corrections Officers' Rights And Prisoners' Rights Before Resorting To International Gender Discrimination	12
CONCLUSION	17

TABLE OF CONTENTS—Continued

	Page
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	3a
APPENDIX D	48a

TABLE OF AUTHORITIES

CASES Page

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 15, 16
Carney v. Martin Luther Home, Inc., 824 F.2d 643 (8th Cir. 1987) 9
Cutter v. Wilkinson, __ U.S. __ (Case No. 03-9877, decided May 31, 2005) 14
Dothard v. Rawlinson, 433 U.S. 321 (1977) 4, 10
Forts v. Ward, 621 F.2d 1210 (2nd Cir. 1980) 13, 14
Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980) 13, 14
Hardin v. Stynchcomb, 691 F.2d 1364, (11th Cir. 1982) 9, 13, 14
Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1981) 5, 8
Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3rd Cir. 1996) 9
International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) 5, 9, 10, 11
Pullman-Standard v. Swint, 456 U.S. 273 (1982).. 10
Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998).. 11, 14
Tharp v. Iowa Dept. of Corrections, 68 F.3d 223 (8th Cir. 1995) 11
Torres v. Wisconsin Dept. of Health and Human Services, 859 F.2d 1523 (7th Cir. 1988) 9, 10, 11
United States v. Gregory, 818 F.2d 1114 (4th Cir.), cert. denied, 484 U.S. 847 (1987) 12, 13, 14
Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) 9
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 4, 7, 8, 9, 10

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
M.C.L.A. §37.2202	3
M.C.L.A. §37.2208	3
28 U.S.C. §1254(1)	2
42 U.S.C. §2000e-2(a)	2
42 U.S.C. §2000e-2(e)	3, 4, 6

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Roslyn Everson, Randy Fox, Stennis George, Richard Idemudia, and Brenda L. Sebastian respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on December 3, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 391 F.3d 737, and is reprinted in the Appendix attached hereto at Pet. App. 3a. The United States Court of Appeals for the Sixth Circuit's order denying the petitioners' Petition for Hearing or Rehearing *En Banc* issued on March 18, 2005, and is attached hereto at Pet. App. 1a. The decision of the United States District Court for the Eastern District of Michigan, dated July 11, 2002, is reported at 222 F. Supp 2d 864 and is appended hereto as Appendix D, at Pet. App. 48a. The final judgment of the District Court issued on August 8, 2002.

JURISDICTION

The decision of the court of appeals was entered on December 3, 2004. A timely Petition for Rehearing or Rehearing *En Banc* was filed on December 16, 2004, and was denied on March 18, 2005. The jurisdiction of this Court to review the judgment of the court of appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("Title VII") provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way, which would deprive or otherwise adversely affect his status as an

> employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(e) reads in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .

Section 202 of Michigan's Elliott-Larsen Civil Rights Act ("Elliott-Larsen"), M.C.L.A. 37.2202 provides in pertinent part:

> (1) An employer shall not do any of the following:
>
> > (b) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Section 208 of Elliott-Larsen, M.C.L.A. § 37.2208, provides in pertinent part:

> A person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

INTRODUCTION

This Petition presents the opportunity for the Court to resolve an important unsettled question of employment discrimination law. Because it is an exception that permits employers to intentionally discriminate against their employees on the basis of sex, age, and other protected characteristics, the "bona-fide occupational qualification" (BFOQ) defense contained in anti-discrimination laws was intended to be "extremely narrow" in scope. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). This Court has said that in order to fit through the narrow BFOQ doorway opened in Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e-2(e), an employer must establish a factual basis for believing that *all* or *substantially all* members of the excluded group would be unable to perform their jobs safely and efficiently. *Dothard*, *supra* at 333. However, this Court has approved a significantly more lenient test in the context of age discrimination, under which an employer can establish a BFOQ by proving that *some* older workers—perhaps only a very small minority—possess a disqualifying characteristic—for example, medical unfitness to safely handle the stress of an emergency—and that it is "impossible or highly impractical" to predict which older workers fall into that category. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414-416 (1985). In other words, considerations unique to the aging process make it permissible in some circumstances to use age as a proxy for a trait that cannot be identified individually.

In this case the Sixth Circuit Court of Appeals transplanted the more lenient BFOQ standard of the ADEA to a gender discrimination claim under Title VII. Reversing a trial court ruling based on extensive fact-finding, the court below approved a BFOQ allowing the Michigan Department of Corrections to exclude males on a systematic basis from corrections officer positions in female inmate housing units. The court of appeals effectively concluded that a permissible

BFOQ under Title VII exists where *some* unidentified male officers—undoubtedly only a very small minority—possibly could engage in sexual misconduct involving female prisoners, justifying the blanket exclusion of all males.

This Court appeared to have foreclosed application of the more permissive ADEA "impossible or highly impractical" standard in the context of sex discrimination claims under Title VII, in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) ("Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead. . . . Johnson Controls has shown no 'factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' Even on this sparse record, it is apparent that Johnson Controls is concerned about only a small minority of women"). Yet the Sixth Circuit here, and perhaps one other circuit, *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1981), have applied the ADEA's more permissive BFOQ standard to claims under Title VII. Other courts have declined to do so.

The law should be clarified. While the employees excluded here are males, the Sixth Circuit's decision will have equal application to the claims of female employees. Allowing employers to rely upon gender as a proxy for legitimate job qualifications, simply because it would be difficult to deal with women on an individualized basis, would open the door to the very sex stereotyping that Title VII was designed to eliminate.

STATEMENT OF THE CASE

This case arose from the decision of the Director of the Michigan Department of Corrections ("MDOC") to engage in wholesale, intentional gender discrimination by adopting a "selective certification" plan that would restrict exclusively to

female officers approximately 250 correction and resident officer positions in housing units at Michigan's three correctional facilities housing female prisoners. The Petitioners, male and female officers whose jobs would have been directly affected, filed suit claiming gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Michigan's Elliott-Larsen Civil Rights Act, MCLA 37.2101, and the Equal Protection Clause.

The district court conducted a bench trial that spanned nine days. Approximately 250 exhibits were entered into evidence.[1] The trial judge had the opportunity to observe the demeanor and assess the credibility of twenty-one witnesses, including eleven expert witnesses. He personally toured the three female prisons.

In a comprehensive sixty-nine page opinion detailing its analysis of the voluminous evidentiary record, which is reported at 222 F. Supp. 2d 864 (E.D. Mich. 2002), the district court concluded that the MDOC's plan violated federal and state equal employment opportunity laws. Pet. App. 48a. The district judge found that MDOC's facially

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[1] The testimony of the expert and other witnesses is reviewed at length in the District Court's opinion. 222 F. Supp. 2d at 880-885. Pet. App. 78a-88a. The documentary evidence presented by the parties included: "MDOC reports and minutes of meetings, staffing reports, training and reporting materials, layouts and photographs of housing units, inmate population data, incident data relating to sexual misconduct and other sanctionable conduct by corrections officers and other personnel, the request to the DCS for selective certification and the responses, position descriptions, court cases papers, expert witness reports, the collective bargaining agreements with the MCO, affidavits, published papers, curriculum vitae of the expert witnesses, narrative statements of direct testimony of the expert witnesses, ACA Standards and a miscellany of other papers relating to MDOC activities and management of prisons." 222 F. Supp. 2d at 885. Pet. App. 89a. The District Judge also reviewed a number of reports and studies obtained from his own research. Pet. App. 89a, n. 32.

discriminatory plan would inflict adverse job consequences on both male and female officers, and that the defendants had failed to prove that gender was a bona fide occupational qualification reasonably necessary to the positions at issue. 222 F. Supp. 2d at 868. Pet. App. 55a. The trial court carefully weighed the trial testimony and the documentary evidence to arrive at seven overall factual findings, based on which it concluded that MDOC had failed to establish that male officers were unable to perform safely and efficiently the duties of the jobs at issue; or that the employment of males would undermine the central mission of the MDOC; or that there were no reasonable alternatives to gender discrimination for ensuring security of the prisons and the privacy of female prisoners. 222 F. Supp. 2d at 893. Pet. App. 105a-108a. The district judge found that the MDOC could accommodate security and other concerns by making gender-specific task assignments without wholesale exclusion of officers from certain positions based on their sex. 222 F. Supp. 2d at 868, 895, 896. Pet. App. 55a, 109a, 111a.[2]

On appeal, the majority of a divided panel of the Sixth Circuit Court of Appeals read the trial record differently. The Sixth Circuit re-analyzed the evidence to conclude that factual support for a genuine bona fide occupational qualification existed. The panel majority did so, however, by importing a legal standard from the age discrimination context set forth in *Western Air Lines, Inc. v. Criswell*, 472

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[2] A group of female prisoners intervened as defendants in this action, a group who had litigated against the Michigan Department of Corrections and obtained a settlement agreement which called for numerous reforms in Michigan's female prisons, but which did not require gender-based job assignments. Parallel litigation by the U.S. Department of Justice resulted in similar reforms. (Pet. App. 60a-63a) As the district court observed, those reforms had reduced the number of allegations of improper conduct against male officers from 57 in 1998, to 40 in 1999, and to 25 in 2000; the sustained allegations dropped from 22 in 1998, to 3 in 1999, to 0 in 2000. Pet. App. 94a.

U.S. 400, 414 (1985)—applied only once by another circuit in the gender-discrimination context—yet failed to remand to the District Court for findings of fact under this new standard.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ALTERS THE LEGAL STANDARD UNDER TITLE VII FOR PROVING THAT GENDER IS A BONA FIDE OCCUPATIONAL QUALIFICATION, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Conflicts With This Court's Decision In *International Union, UAW v. Johnson Controls, Inc.*, And The Decisions Of The Majority Of Circuit Courts After *Johnson Controls.*

The court below held that an employer may prove, as a defense to intentional gender discrimination in a Title VII case, that gender is a bona fide occupational qualification (BFOQ) by showing that "it is impossible or highly impractical" to determine on an individualized basis the fitness for employment of members of one gender. Pet. App. 20a-21a. This standard for proving that gender is a bona fide occupational qualification has been applied by one other jurisdiction, the Ninth Circuit Court of Appeals. *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980).

The decision below is in conflict, however, with the decision of this Court in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and the decisions of the Third, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals, which have upheld a more rigorous standard: an employer must prove that gender is a bona fide occupational qualification by showing a factual basis for believing that "all or substantially all [members of one gender] would be unable to perform safely and efficiently the duties of the job

involved." *Id.* at 207; *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (quoted in *Johnson Controls*, *supra* at 207); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3rd Cir. 1996); *Torres v. Wisconsin Dept. of Health and Human Services*, 859 F.2d 1523, 1527, 1530-31 (7th Cir. 1988); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 649 (8th Cir. 1987); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370 (11th Cir. 1982).[3]

In fact, in *Johnson Controls*, *supra*, this Court not only used the "all or substantially all" standard for gender-based BFOQ's, but also rejected an employer's BFOQ defense that it was "impossible or highly impractical" to determine on an individualized basis the fitness for employment of women in certain jobs. Specifically at issue in *Johnson Controls* was an employment policy that excluded all fertile women from jobs entailing exposure to lead, which presented a risk to fetuses. Explicitly citing the "impossible or highly impractical" standard set forth in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) for BFOQ's in the context of age discrimination challenged under the Age Discrimination in Employment Act (ADEA), the employer defended this policy as a BFOQ on the grounds that "it would be 'impossible or highly impractical' for Johnson Controls to restrict its policy to those who actually will become pregnant." (Johnson Controls' brief on the merits, p. 45, quoting *Criswell*) This Court, however, rejected that argument and stated that the employer failed to show a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job. *Johnson Controls*, *supra*

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[3] Although the court below initially disavowed reliance on the "impossible or highly impractical" standard by asserting that "our decision does not turn on the use of either standard" (Pet. App. 20a-21a, n. 15), the disavowal was short-lived. The court went on to conclude that the "impossible or highly impractical" standard "better suits the instant case" and fashioned its analysis thereunder. (Pet. App. 33a)

at 207 (explicitly rejecting the employer's argument that it was necessary to "exclude all fertile women" from jobs entailing lead exposure because "it is impossible to tell which women will become pregnant while working with lead").

Despite this Court's rejection of the *Criswell* standard in the context of gender discrimination, the court below relied upon the same case law—*Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985)—for the same BFOQ defense—that it was "impossible or highly impractical" to determine which male corrections officers would breach their duties and violate the asserted constitutional rights of female prisoners. Pet. App. 20a-21a. Moreover, after overturning the *Johnson Controls* BFOQ standard employed by the district court, the court of appeals simply reversed rather than remanding for factfinding under a different legal standard, contravening *Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982) ("[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.")

In so doing, the court below impermissibly strayed from this Court's decision in *Johnson Controls*, *supra*, and from other decisions involving the gender-based removal of corrections officers from the housing units of prisoners of the opposite gender. In *Dothard v. Rowlinson*, 433 U.S. 321, 333 (1977), this Court favorably quoted the "all or substantially all" standard from *Weeks, supra,* where the record evidence strongly supported the conclusion that the employment of female corrections officers would jeopardize the safety of the maximum security prisons for male inmates in Alabama. In *Torres v. Wisconsin Dept. of Health and Human Services*, *supra*, the Seventh Circuit Court of Appeals followed the BFOQ standard employed by this Court in *Johnson Controls*, *supra*, to conclude that the employer had shown a factual basis for believing that all or substantially all males would be

unable to perform the duties of the job at issue, and thus found that the employer had demonstrated a gender-based BFOQ. 859 F.2d at 1530-31.[4]

Here, however, the court below invoked a different standard to justify its reversal of the district court's detailed finding that the employer failed to show a factual basis for believing that all or substantially all male officers could not perform their jobs in the housing units safely and efficiently. Applying the "impossible or highly impractical" standard imported from the ADEA, the Sixth Circuit overstated this Court's general observation that the ADEA "tracks" Title VII's provisions, *Johnson Controls*, *supra* at 201, and effectively fashioned an *ad hoc* approach to BFOQ inquiries which fails to give guidance with a uniform standard. In the words of the court below, the "impossible or highly impractical" standard "better suits the instant case" (Pet. App. 33a); but the court did not explain why and did not offer any legal compass to direct the trial courts and potential litigants as to which standard would "better suit" a particular case in the future.

The Sixth Circuit was wrong in holding that the ADEA's "impossible or highly impractical" BFOQ standard suits a gender discrimination claim under Title VII. Just as Johnson Controls' concern about a *small minority* of women could not justify excluding *all* women from battery-making jobs,

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[4] Two other circuits have dismissed challenges by male officers who were excluded from female prison settings on the basis of gender, but the reason for the dismissals was that the plaintiffs failed to show adverse employment consequences resulting from the exclusion. *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998); *Tharp v. Iowa Dept. of Corrections* 68 F.3d 223, 225-226 (8th Cir. 1995). By contrast, in the instant case, the district court specifically found adverse employment consequences resulting from the defendants' intentional gender discrimination (Pet. App. 80a, 96a), a finding which the court of appeals did not reverse (Pet. App. 18a, n. 13).

MDOC's concern about a small minority of males cannot justify excluding all males from positions in the female housing units. The *Criswell* BFOQ standard resulted from considerations unique to the aging process, which have no application where gender discrimination is concerned. In light of latent physical or mental effects of aging that cannot be detected, it may be reasonable in some circumstances to rely on age as a proxy for screening out employees who may be unable to safely or efficiently perform a job. The same cannot be said for screening out all members of one sex. Accepting the *Criswell* BFOQ standard to justify gender discrimination will set employment rights back decades—particularly for female workers.

Guidance from this Court is necessary to clarify the legal standard applicable to determining whether gender can be a bona fide occupational qualification, a standard now in doubt because of the decision below.

B. The Decision Below Also Conflicts With The Settled Law That A Corrections Employer Must First Strive To Rearrange Job Responsibilities In Order To Accommodate Both Corrections Officers' Rights And Prisoners' Rights Before Resorting To Intentional Gender Discrimination.

The interpretation of Title VII in the context of prisons has required the federal courts to balance and reconcile a variety of important interests. More specifically, the federal courts have recognized that prisons must endeavor to arrange job responsibilities in order to accommodate prisoners' rights to privacy and safety, and the Title VII rights of corrections officers to be free from gender discrimination. *United States v. Gregory*, 818 F.2d 1114, 1118 (4th Cir.) ("Before a defendant prison can claim entitlement to the BFOQ exception to Title VII contained in § 703(e), it must demonstrate why it cannot reasonably rearrange job responsibilities within the

prison in order to minimize the clash between the privacy interests of the inmates and the safety of the prison employees on the one hand and the non-discrimination requirement of Title VII on the other."), *cert. denied*, 484 U.S. 847 (1987); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1374 (11th Cir. 1982) ("Defendants . . . have failed to prove they cannot rearrange job responsibilities so that female deputies assigned to male sections of the jail will not have to perform duties that impinge upon inmate privacy rights"); *Forts v. Ward*, 621 F.2d 1210, 1217 (2nd Cir. 1980) ("the remedy proposed by the State will accord adequate protection to the privacy interests of the inmates that will avoid any denial of the guards' rights to equal employment opportunities"); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir. 1980) (prison employer "must also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates, and the nondiscrimination principle of Title VII").

The district court followed this line of cases to preserve the rights of both corrections officers and prisoners. Based upon his thorough analysis of the record, including the testimony of several experts, the district judge found that the Michigan Department of Corrections can, does, and should assign particular *tasks* in the female housing units on a gender-specific basis, rather than assign entire *jobs* in the female housing units based on gender. Pet. App. 108a-111a. As the trial judge explained:

> "Strip searches, observation of female inmates while undressed, and staffing of medical visits are all discrete *tasks* which should be limited to female corrections officers as is transport under some circumstances. Pat down searches are of the same order. The Securicor study supports gender specific task assignments. All this, however, does not make out a case for gender specific assignment of [corrections officers and resident unit officers] in the housing unit and plaintiffs'

> willingness to accept the principle of gender specific tasks does not mean they concede the MDOC's position." [Pet. App. 111a (emphasis in original).]

The trial court took a balanced approach that respected the rights of female prisoners yet also required the MDOC to refrain from violating the Title VII rights of corrections officers. Such a balance was found to be entirely feasible and appropriate in the context of the Michigan prisons on the exhaustive record before the district court. *Cf. Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998) (upholding BFOQ for six out of forty-one guard positions in small prison setting after studies and extensive deliberation following an EEOC settlement agreement) (distinguished from the facts of this case at Pet. App. 101a-103a, 115a-117a).

The Sixth Circuit, however, abandoned the balanced approach taken by the district court and by other circuits in *Gregory*, *supra*; *Hardin*, *supra*; *Forts*, *supra*; and *Gunther*, *supra*. Ignoring the settled approach, the Sixth Circuit made no effort to reconcile the corrections officers' Title VII rights with the prisoners' rights. Instead, it presumed a direct conflict between the rights of corrections officers and those of prisoners and concluded that all male officers must be removed wholesale from the female housing units—regardless of what the credited expert testimony revealed about safe practices ensuring officers' rights and prisoners' rights. The court of appeals justified this departure on the ground that the director of MDOC should have the "ability to innovate" for the sake of prison safety. Pet. App. 40a.

Such a one-sided approach wrongly deviates from the recent decision in *Cutter v. Wilkinson*, __ U.S. __ (Case No. 03-9877, decided May 31, 2005), where this Court reemphasized that a state correctional system cannot axiomatically assert safety concerns to trump statutory or constitutional rights. *Cutter v. Wilkinson* upheld the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.

§ 2000cc-1(a)(1)-(2), against an attack that, in part, asserted that the statute would compromise prison security, based upon the trial court's finding that there was insufficient evidence to prove a threat to prison security.

Likewise here, the trial court carefully scrutinized the record and found insufficient evidence to support the MDOC's argument that prison security necessitates intentional gender discrimination. The district court found that there were ways to reconcile corrections officers' Title VII rights with prisoners' rights without jeopardizing prison security, through the restructuring of job tasks and other measures that had been recommended but never implemented. Pet. App. 105a-106a, 108a-109a, 111a. The court of appeals brushed aside the trial court's extensive factual findings on this issue by relying upon the testimony of three expert witnesses (Pet. App. 28a-30a) whom the district court had decided not to credit over testimony of the plaintiffs' experts (Pet. App. 106a). By doing so the Sixth Circuit arrogated the fact finding role that F.R.C.P. 52(a) clearly assigns to the district court. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).[5]

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[5] To take one example of how the court of appeals simply substituted its own factfinding for the trial court's: the district court made factual findings on the important issue of whether non-discriminatory alternatives to the MDOC's facially discriminatory plan would preserve safety. The trial judge relied on the testimony of the plaintiffs' expert witness, Dr. Harley V. Stock, a psychologist specializing in employment matters. Dr. Stock rendered an opinion that MDOC could reduce the risk of sexual misconduct through standard pre-employment screening measures. 222 F. Supp. 2d at 880. Pet. App. 78a-79a. Stock testified regarding his own success in using such tests, and he identified flaws in a 1995 study upon which the MDOC relied to conclude that psychological testing was unsatisfactory. An expert witness for the defendants testified that pre-employment testing had no predictive value. *Id.* at 883. Pet. App. 83a. The district judge concluded that pre-employment screening, in use among many prison systems, was one among many reasonable alterna-

Further, tossing aside extensive fact-finding by the district court, the Sixth Circuit held that deference to the "professional judgment" of the MDOC's Director was "mandate[d]" in this case. Pet. App. 28a The district court declined to accord such deference based on evidence that included the Director's dearth of experience in corrections and the contrary recommendations of the two professional committees that had been convened to study whether removal of male officers from the female housing units was necessary. See, Pet. App. 64a-66a, 105a-106a, 116a-117a. The court below overstepped the boundaries of its appellate role under the clearly erroneous standard set forth in F.R.C.P. 52(a), and at the same time failed

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tives. *Id.* at 895. Pet. App. 108a. The court of appeals, speaking in the voice of a fact-finder, made its own credibility determination concerning Dr. Stock's testimony:

> The district court also erred in concluding that pre-employment screening constituted a reasonable alternative to a female BFOQ. Harley Stock, an expert for the plaintiffs, testified that the MDOC could reduce its risk of hiring applicants likely to engage in sexual abuse by instituting psychological testing and making other changes in its pre-employment screening. However, Stock conceded that (1) the tests he proposed do not measure a subject's proclivity for sexual abuse specifically, but instead place subjects into high risk categories that "might include such things as inappropriate sexual behavior" or assess "the ability to relate to members of the opposite sex," (2) he had not conducted follow-up studies to assess the accuracy of his testing methods, (3) his proposed testing is valid only for a year, and (4) he saw the testing of current employees as a "problem." Given its speculative value, and its limited applicability, testing does not qualify as a reasonable alternative to gender-specific assignments. ~~[Pet. A~~App. 34a (citation omitted).]

The foregoing is symptomatic of the court of appeals' fundamental misapplication of the clearly erroneous standard of review set forth in F.R.C.P. 52(a). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer, supra*, at 574.

to undertake an effort reconcile the rights of corrections officers with the asserted rights of prisoners.

This Court should review the decision below to resolve the conflicting views as to the appropriate legal standard for determining whether gender is a BFOQ, and to explicate the proper balancing of interests and the appellate court's role in a factually complex BFOQ case such as this.

CONCLUSION

For the above reasons, Petitioners respectfully request that the Court grant the Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

JOHN R. RUNYAN *
ANDREW NICKELHOFF
MARSHALL J. WIDICK
SACHS WALDMAN, P.C.
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed March 18, 2005]

Nos. 02-2028/2033/2084

ROSLYN EVERSON, *et al.*,
Plaintiffs-Appellees,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS, *et al.*,
Defendants-Appellants (02-2033),

LINDA NUNN, *et al.*,
Intervening Defendants-Appellants (02-2028/2084).

ORDER

BEFORE: NORRIS, GILMAN, and ROGERS, *Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Dec. 3, 2004]

Nos. 02-2028; 2033; 2084

ROSLYN EVERSON; RANDY FOX; STENNIS GEORGE; BRENDA L. SEBASTIAN, and a class of all persons similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS; BILL MARTIN, individually and in his official capacity as Director of the Michigan Department of Corrections,
Defendants-Appellants (02-2033),

LINDA NUNN; TRACY NEAL,
Intervening Defendants-Appellants (02-2028/2084).

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

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JUDGMENT

BEFORE: NORRIS, GILMAN, and ROGERS, *Circuit Judges*.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED with instructions to dismiss the complaint.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 02-2028/2033/2084

ROSLYN EVERSON; RANDY FOX; STENNIS GEORGE; BRENDA L. SEBASTIAN, and a class of all persons similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS; BILL MARTIN, individually and in his official capacity as Director of the Michigan Department of Corrections,
Defendants-Appellants (02-2033),

LINDA NUNN; TRACY NEAL,
Intervening Defendants-Appellants (02-2028/2084).

Appeal from the United States District Court for the Eastern District of Michigan at Detroit
No. 00-73133 Avern Cohn, District Judge

Argued: February 4, 2004
Decided and Filed: December 3, 2004

BEFORE: NORRIS, GILMAN, and ROGERS, *Circuit Judges*.

COUNSEL

ARGUED: Deborah A. LaBelle, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, Mark W. Matus, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellants. John R. Runyan, SACHS

WALDMAN, Detroit, Michigan, for Appellees. ON BRIEF: Deborah A. LaBelle, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, Mark W. Matus, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellants. John R. Runyan, Eileen Nowikowski, Marshall J. Widick, SACHS WALDMAN, Detroit, Michigan, for Appellees.

ROGERS, J., delivered the opinion of the court, in which NORRIS, J., joined. GILMAN, J. (pp. 20-21), delivered a separate dissenting opinion.

OPINION

ROGERS, *Circuit Judge*. Following separate lawsuits by female prisoners in Michigan and by the Civil Rights Division of the United States Department of Justice, both of which alleged rampant sexual abuse of female prisoners in Michigan, the Michigan Department of Corrections (the "MDOC") barred males from working in certain positions at its female prisons. Specifically, the MDOC designated approximately 250 Correctional Officer ("CO") and Residential Unit Officer ("RUO") positions in housing units at female prisons as "female only." A group of MDOC employees, both males and females, sued the MDOC, alleging that the MDOC's plan violated Title VII of the Civil Rights Act-of 1964, 42 U.S.C. § 2000e-2(a), and Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2202. Following a bench trial, the district court ruled in the plaintiffs' favor, concluding, among other things, that gender was not a bona fide occupational qualification (a "BFOQ") for the positions in question. The district court entered a permanent injunction enjoining the MDOC from making gender-specific assignments at female prisons. Because gender is a BFOQ for the positions in question, we reverse the judgment of the district court.

BACKGROUND

At the time of trial, the MDOC managed a population of approximately 2000 female prisoners.[1] Currently, the MDOC houses most of its female prisoners at three facilities. The Robert Scott Correctional Facility (the "Scott Facility"), located in Plymouth, Michigan, is a multilevel prison with an operating capacity of 860 prisoners, and it serves as the reception center for all incoming female prisoners. The Western Wayne Correctional Facility (the "Wayne Facility"), also located in Plymouth, Michigan, is a secure Level I facility with an operating capacity of 775. Camp Brighton, located near Pinckney, Michigan, is a Level I facility with barracks-style housing, and it has an operating capacity of 358.

At the time of trial, the MDOC employed approximately 19,000 persons, about 9400 of whom served as COs and RUOs. The duties of COs and RUOs in the housing units include patrolling the sleeping, shower, and bathroom areas, attending to the basic needs of women prisoners (including the provision of sanitary supplies), monitoring activity in the living quarters, enforcing housing rules and procedures, and assuring that proper standards of care and hygiene are maintained. RUOs staff the housing units on the first and second shifts, while COs staff the housing units on the third shift. CO positions outside the housing units include intake officer and transportation officer. Intake officers shepherd prisoners through the intake process, during which new prisoners are strip searched, fingerprinted, and showered, and during which paperwork is completed on the prisoners. Intake officers examine prisoners while they are naked. Among other things, transportation officers drive inmates to prisons

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[1] At the time of trial, female prisoners represented 4.3% of the MDOC's total population of approximately 46,000 prisoners. According to the MDOC, since trial, the total population has increased to 50,600 prisoners, and the female population has increased to 2,100 prisoners, 4.2% of the total population.

to which they have been transferred and to medical appointments. Sometimes during transportation, female prisoners, who are placed in restraints, require the assistance of a transportation officer to use the bathroom.

The parties have provided only a partial picture of the staffing at Michigan's female prisons. According to the testimony of Lori Sahl, a corrections officer employed at the Wayne Facility, there are three officers per shift assigned to each housing unit at the Wayne Facility. Each unit comprises a pair of wings which house between 80 and 90 inmates each. One officer works the "A" wing, one officer works the "B" wing, and one officer works at a desk, where he or she watches the other two officers as they make their rounds. R. 113, Tr. at 91. According to the testimony of Joan Yukins, the warden of the Scott Facility, the housing units at the Scott Facility are shaped like a bow tie with an "A" side, a "B" side, and a "center" containing offices and laundry rooms. In most of the units, each side holds 96 inmates, though the capacity is lower in the high-security and psychiatric units. For the most part, the units are staffed with either two officers per side or one officer per side plus a "rover." R. 119, Tr. at 15-18, 21.

The problem of sexual abuse[2] and other mistreatment of female inmates has long plagued the MDOC. In 1993, fol-

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[2] The MDOC recognizes three categories of what we collectively term "sexual abuse." "Sexual misconduct" means engaging in, or attempting to engage in, any of the following:

1. A sexual act with any prisoner.
2. The intentional touching, either directly or through clothing, of a prisoner's genitals, anus, groin, breast, inner thigh or buttocks with the intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person.
3. Prohibited physical contact, including fondling or kissing.
4. Indecent exposure or other indecent sexual behavior by staff in the presence of a prisoner.

lowing interviews of a number of inmates, the Michigan Women's Commission[3] advised the MDOC that it believed that "sexual assault and harassment are not isolated incidents and that fear of reporting such incidents is a significant problem." In 1996, after an independent investigation, Human Rights Watch issued a report concluding that "rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are continuing and serious problems within the women's prison, in Michigan [and] have been tolerated over the years at both the institutional and departmental levels.[4] Human Rights Watch also charged that the male corrections' staff routinely violated the privacy rights of inmates by, for example, abusing their power to conduct "pat-down" searches and improperly viewing inmates as they used the shower or toilet. Later, in 1998, Human Rights Watch issued a second report describing a campaign of retaliation by corrections staff against several women who had made public accusations of sexual abuse. In 1999, following its own investigation, the United Nations Commission on Human Rights seconded Human Rights Watch's charge that corrections officers systematically retaliated against women who reported sexual abuse.

"Sexual Harassment" means "sexual advances, requests for sexual favors, and other offensive verbal or physical conduct, including communications, of a sexual nature with a prisoner. This includes verbal conduct of a gender-related nature intended to humiliate, harass, degrade or arouse." "Overfamiliarity" means "[c]onduct between staff and a prisoner which has or is likely to result in intimacy or a close personal association, or conduct that is contrary to the good order of the facility."

[3] The Michigan Women's Commission is an independent unit in the executive office of the governor. Mich. Comp. Laws Ann. § 10.71 (West 2001).

[4] Human Rights Watch found that the current allegations of sexual abuse were "consistent with a pattern and practice of conduct in women's prisons since, at least, the mid-1980s."

Statistics compiled by the parties add some content to the charge of rampant sexual abuse of female inmates in Michigan's prisons. According to the MDOC, between 1994 and January 31, 2001, it investigated 217 allegations of sexual misconduct[5] against female inmates, of which 43 were sustained and of which only 47 were deemed unfounded. According to the plaintiffs' calculations, between 1994 and 2000, female inmates made 208 allegations of sexual misconduct, of which 58 were sustained or resulted in the resignation, leave, or discharge of the accused. In 1997 and 1998, Michigan cases constituted 10 out of a total of 20 convictions of male staff nationwide for criminal sexual conduct against women prisoners.

In addition to public criticism, the MDOC faced a pair of high-profile lawsuits involving the sexual abuse of female inmates in this period. On March 27, 1996, a group of female inmates[6] filed suit in the United States District Court for the Eastern District of Michigan against the MDOC and a number of state officials and corrections officers (the "*Nunn* lawsuit"). The inmates alleged rampant sexual misconduct, sexual harassment, violation of privacy rights, and retaliation by corrections officers, and they asserted violations of the First, Fourth, Eighth, Ninth, and Fourteenth Amendments under 42 U.S.C. § 1983, and of the Violence Against Women Act, 42 U.S.C. § 13981. The inmates' monetary claims were settled for a little less than $4 million, and, on July 31, 2000, the inmates' claim for injunctive relief was resolved by a settlement agreement (the "*Nunn* agreement"). In the *Nunn* agreement, the MDOC pledged, among other things, to restrict pat-down searches of female inmates by male staff, to require

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[5] These figures do not include allegations of sexual harassment or overfamiliarity. Additionally, evidence presented at trial indicates that sexual misconduct may be underreported. R. 117, Tr. at 164; J.A. at 3149, 4177.

[6] The plaintiffs' Second Amended Complaint named 32 female inmates as plaintiffs.

male staff to announce their presence upon entering a housing unit area, and to maintain areas where inmates may dress, shower, and use the toilet without being observed by male staff. Additionally, the *Nunn* agreement provided that "[c]onsistent with the MDOC's announced intention to limit the assignment of staff in faciliy housing units to female officers, the MDOC will make a good faith effort to accomplish this objective."[7]

In June of 1994, the Civil Rights Division of the United States Department of Justice (the "DOJ") initiated an investigation of allegations of sexual abuse and other violations of the constitutional rights of inmates at a pair of Michigan women's prisons pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq*. The State refused to grant the DOJ access to the facilities, but the DOJ managed to interview over 100 inmates in the course of its investigation. By a letter dated March 27, 1995, the DOJ advised the Governor of Michigan that it had concluded that "various acts, practices, and other conditions at both facilities deny inmates confined there of their constitutional rights." The DOJ found that "sexual abuse of women inmates by guards,

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[7] More completely, the MDOC agreed in the *Nunn* agreement to (1) screen applicants for positions involving contact with female inmates for drug abuse and criminal histories, (2) train staff and internal investigators on issues relating to the supervision of prisoners, (3) review training materials on sexual misconduct for prisoners, (4) minimize access to secluded areas and one-on-one contact between male staff and inmates, (5) ban pat-down searches of inmates by male staff absent emergency circumstances during a twelve-month evaluation period, (6) require male staff to announce their presence upon entering a housing unit area, (7) maintain areas where inmates may dress, shower, and use the toilet without being observed by male staff, (8) assign at least one female to transport an inmate, (9) facilitate prisoner and staff reporting of allegations of sexual misconduct, sexual harassment, and retaliation, (10) investigate allegations of sexual misconduct, sexual harassment, and retaliation timely and completely, and (11) make a good faith effort to limit the assignment of staff in housing units to female officers.

including rapes, the lack of adequate medical care, including mental health services, grossly deficient sanitation, crowding, and other threats to the physical safety and well-being of inmates violates their constitutional rights." The DOJ letter reported a pattern of sexual abuse, including sexual assaults by guards, "frequent" sexual activity between guards and inmates, sexually aggressive acts by guards (such as pressing their bodies against inmates, exposing their genitals to inmates, and fondling inmates during "pat-down" searches), and ubiquitous sexually suggestive comments by guards. The DOJ letter also detailed improper visual surveillance of inmates, including the "routine" practices of watching inmates undress, use the shower, and use the toilet.

Two years later, on March 10, 1997, the DOJ filed suit against the State of Michigan in the United States District Court for the Eastern District of Michigan (the "*USA* lawsuit") pursuant to the Civil Rights of Institutionalized Persons Act. The United States alleged that Michigan was violating the constitutional rights of female inmates by failing to protect them from sexual misconduct, by failing to prevent unlawful invasions of their privacy, and by failing to provide adequate medical and mental health care. After conducting extensive discovery, the United States dismissed its claims related to the provision of medical and mental health care. On May 25, 1999, the parties entered into a settlement agreement resolving the remaining claims (the "*USA* agreement"). In the *USA* agreement, Michigan pledged, among other things, to minimize access to secluded areas and one-on-one contact between male staff and female inmates, to implement a "knock and announce" policy whereby male officers must announce their presence prior to entering areas where inmates normally could be in a state of undress, and to restrict pat-down searches of female inmates by male staff.[8] The MDOC also

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[8] More completely, Michigan agreed to (1) conduct pre-employment screening, including drug testing and criminal background checks, to

agreed to conduct a study exploring the feasibility of "redeploying officers to increase the presence of female officers in the housing units" and "rotating staff assignments to housing units" and, if feasible, to implement a plan consistent with this study.

On June 25, 1999, and on October 25, 1999, the MDOC's Director issued Director's Office Memoranda to implement the *USA* agreement. On December 6, 2000, the Director signed a Policy Directive that superseded the Director's Office Memoranda and formalized the changes mandated by the *USA* and *Nunn* agreements. Major changes in policy instituted by the MDOC included a moratorium on pat-down searches of female inmates by male officers absent exigent circumstances; a "knock and announce" policy requiring male staff to announce their presence before entering places where female prisoners are likely to be in a state of undress; a uniform dress code for prisoners; the minimization of one-on-one contact between male staff and female inmates and of access to secluded areas; the maintenance of one or more

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determine the fitness of applicants for work at female prisons, (2) provide specialized training for employees at female prisons, (3) educate inmates on the MDOC's prohibitions against sexual misconduct, sexual harassment, and overfamiliarity, (4) facilitate inmate and staff reporting of allegations of sexual misconduct, sexual harassment, and overfamiliarity, (5) investigate allegations of sexual misconduct, sexual harassment, and overfamiliarity in a timely and complete fashion, (6) minimize access to secluded areas and one-on-one contact between male staff and female inmates, (7) conduct random interviews of inmates concerning sexual misconduct, sexual harassment, and overfamiliarity, (8) implement a "knock and announce" policy whereby male officers must announce their presence prior to entering areas where inmates normally could be in a state of undress, (9) ban "pat-down" searches of female inmates by male staff absent exigent circumstances during an evaluation-period of at least six months, (10) screen inmates for past histories of physical or sexual abuse, and (11) conduct a study to explore the feasibility of redeploying officers to increase the presence of female officers in the housing units and of rotating staff assignments to the housing units.

locations where inmates may dress, shower, and use the toilet out of sight of male staff; random interviews of female inmates; specialized training for inmates and staff at female prisons; improved procedures for investigating allegations of sexual misconduct and retaliation; and drug testing of and criminal history checks on applicants for employment.

Sometime in 1998, prior to the *USA* and *Nunn* agreements, the MDOC's Director[9] appointed a Gender Specific Assignment Committee (the "GSAC"), consisting of a number of high-level MDOC officials, which was instructed to review officer assignments within Michigan's correctional facilities—both male and female—for the feasibility of making them gender-specific. In its final report, which was issued on December 11, 1998, the GSAC recommended gender-specific assignments to certain tasks, such as strip searches, pat-down searches, and urine collection. However, the GSAC unanimously endorsed gender neutrality in assignments to first- and second-shift positions in housing units, and a majority of the committee advised against gender-specific assignments to third-shift positions in housing units. Four of six members recommended that the MDOC move toward "gender balance" —meaning that, "where more than one officer is assigned, the second officer may be gender specific"—through attrition, stating that they did not "believe gender specific assignments are a viable option due to the labor pool and union contracts," but observing that "some states have voluntarily implemented gender specific assignments on specific shifts through letters of agreement with the corrections officers' union or have responded to various threats/instances of court intervention." One of the dissenters advised that only females should be assigned to third-shift housing unit positions in female facilities, while the other advocated gender-specific assignments to

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[9] The defendant, Bill Martin, was appointed as Director of the MDOC in 1999.

third-shift housing unit positions in both male and female facilities.

Pursuant to the *USA* agreement, the MDOC commissioned Securicor New Century, LLC ("Securicor"), a consulting firm, to study ways to increase the presence of female officers in the housing units at Michigan's women's prisons. In particular, Securicor was instructed to explore the feasibility of redeploying female officers to positions in the housing units and of rotating staff assignments. Securicor's report, dated August 20, 1999, recommended a number of strategies for increasing the number of female officers in the housing units, including exploring the redeployment of all available female officers to housing units, covering RUO vacancies in the housing units with female COs, redeploying female officers in supervisory positions, exploring the possibility of rotating female officers assigned to housing units to different shifts and locations, creating incentives for female applications, changing the shift times to create overlapping shifts, and revising the criteria for promotion.

On October 13, 1999, during testimony before the House Appropriations Subcommittee on Corrections of the Michigan House of Representatives, Bill Martin, the MDOC's Director, disclosed that the MDOC was exploring the possibility of removing male officers from certain areas in female facilities, as well as female officers from certain areas in male facilities, in order to minimize incidents of sexual misconduct. On December 9, 1999, Martin formally announced his intention to remove male officers from female prisons, stating, "I am convinced that the single best way to protect [male officers'] personal and professional lives is to remove them from those assignments in which they are most vulnerable" to allegations of sexual abuse. According to the district court, Martin was unaware of the GSAC's analysis when he made this decision, and there was no evidence presented at trial that any internal MDOC memoranda recommended such a step or that Martin

had consulted the Michigan Department of Civil Rights or the Attorney General of Michigan regarding the change.

In February 2000, the MDOC hired Michael Mahoney[10] to study "whether certain custody positions at MDOC women's facilities should be filled only by female custody staff or if there is a less intrusive means to ensure the safety and reasonable privacy needs of female inmates." In June 2000, Mahoney issued a report concluding that only female officers should fill the CO and RUO positions in housing units, segregation units, and intake units at Michigan's women's facilities. He opined that this reform would reduce the likelihood of sexual misconduct, improve the security in the housing units by removing "gun-shy" male officers and by permitting increased surveillance of inmates, and reduce false allegations of sexual misconduct. Mahoney advised that reforms undertaken pursuant to the *Nunn* and *USA* settlements could not alone address the problems of sexual abuse and inmate privacy.

On August 2, 2000, the MDOC filed applications with the Michigan Department of Civil Service (the "MDCS") for "selective certification" of CO and RUO positions in the housing units, segregation units, and intake units at its women's facilities as "female only." In the applications, the MDOC reported that it had faced lawsuits alleging sexual misconduct and violation of privacy rights of female inmates, and had made a number of changes in response to these charges. However, it stated that "it is felt that these changes will not eliminate inappropriate behavior or sexual misconduct," and it claimed that selective certification would

> enhance the privacy of female prisoners, reduce the likelihood of sexual misconduct; the reduction [sic] of

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[10] Mahoney was the president and executive director of the John Howard Association, a private, not-for-profit prison reform group, and he served as an expert for the DOJ in the *USA* lawsuit.

> fear of sexual misconduct will enhance the ability of the [MDOC] to achieve its mission, security capabilities would be improved due to much less reluctance by female staff to perform observation duties, and female staff only in housing units would reduce the likelihood of instances where individual male staff and individual female prisoners would be involved in long isolated contacts.

On August 14, 2000, the MDCS approved the MDOC's applications without a hearing. As of the summer of 2001, the certification affected 267 positions—257 CO and RUO positions in housing units, 8 transportation officers, and 2 intake officers. The MDOC contends that, in the interim, the total number of affected positions has decreased to 247.

On July 12, 2000, the plaintiffs[11] filed suit against the MDOC and Bill Martin, the MDOC's director, in his official capacity and individually, in the United States District Court for the Eastern District of Michigan. The plaintiffs alleged that gender-based assignments at female correctional facilities violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a)(1), and Michigan's Elliott-Larsen Civil Rights Act (the "Elliot-Larsen Act"), Mich. Comp. Laws Ann. § 37.2202(1)(a) (West 2001). Additionally,

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[11] The original plaintiffs are (1) Roslyn Everson, a CO at the Scott Facility, (2) Randy Fox, an RUO at the Camp Branch Correctional Facility in Coldwater, Michigan, which, at the time the suit was filed, housed female inmates, (3) Stennis George, an RUO at the Scott Facility, and (4) Brenda L. Sebastin, a CO at the Camp Cassidy Lake Correctional Facility in Chelsea, Michigan, which, at the time the suit was filed, housed female inmates. Later, Richard Idemudia, an RUO at the Western Wayne Facility, was added as a plaintiff On November 1, 2000, the plaintiffs moved for certification of a class composed of all corrections officers and related classes of employees who have been or will be adversely affected by the gender-based assignments at correctional facilities that house female prisoners. The district court never ruled on the motion, which the defendants opposed.

the plaintiffs asserted against Martin an Equal Protection Clause claim under 42 U.S.C. § 1983. Plaintiffs sought a declaratory judgment that gender-based assignments at female correctional facilities violated Title VII, the Elliott-Larsen Act, and the Equal Protection Clause, injunctive relief enjoining further discrimination, damages for lost earnings, compensatory damages for emotional distress and damage to their reputations, punitive damages against Martin, and attorney fees pursuant to Title VII and the Elliott-Larsen Act.

On September 28, 2000, the district court entered a temporary restraining order, which enjoined the MDOC and Martin "from implementing the plan to make gender-specific assignments and/or to allow only female staff to hold Corrections Officer and Resident Unit Officer positions in work assignments in housing units, segregation units and/or intake units at the Robert Scott, Western Wayne, and Camp Branch Correctional Facilities." On October 13, 2000, the district court granted a motion for intervention filed by a group of female inmates—specifically, the certified class from the *Nunn* Lawsuit and the certified class in *Neal v. MDOC*, No. 96-6986-CZ (Washtenaw Co. Cir. Ct.), another class action by female inmates against the MDOC alleging sexual abuse, privacy violations, and retaliatory conduct by male staff.

The bench trial began on February 13, 2001, and continued over nine days until March 7, 2001. On July 11, 2002, the district court entered a decision and a declaratory judgment providing that gender-based assignments to the CO and RUO positions at the Scott Facility, the Wayne Facility, and Camp Brighton violate Title VII and the Elliot-Larsen Act. The court concluded that the implementation of the policy would have an adverse employment effect on the plaintiffs and that gender was not a bona fide occupational qualification. On August 8, 2002, the district court entered a final judgment, which permanently enjoined the defendants from implement-

ing the plan to make gender-specific assignments to CO and RUO positions at the Scott Facility, the Wayne Facility, and Camp Brighton, and which dismissed the plaintiffs' § 1983 claim against Martin with prejudice.[12]

The district court concluded that gender is not a BFOQ for housing unit officers. The court explained that "[t]here has simply been no showing that there is reasonable cause to find that all, or substantially all, males are not able to perform safely and efficiently the duties of a CO and RUO in the housing units in the female prisons." *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864, 895 (E.D. Mich. 2002). In reaching this conclusion, the court made the following findings of fact: (1) standard practices nationwide provide for the employment of male corrections officers in female prisons and "there is nothing unique about the operation of the female prisons in Michigan"; (2) the GSAC and Securicor studies did not recommend this strategy, and "there is no evidence that any MDOC official supported it at the time the request was made to [the MDCS] for selective certification"; (3) the concern over cross-gender supervision of prisoners originated with Martin; (4) the opinions of the plaintiffs' experts were "considerably more credible" than those of the defendants' experts; (5) the changes required by the *USA* and *Nunn* agreements have only recently been implemented; (6) statistical evidence showed a "substantial decrease" in improper conduct since the implementation of the changes called for in the *USA* and *Nunn* agreements; and (7) "the published literature on the presence of male correctional officers in female prisons does not support a female BFOQ for corrections officer in the housing units in a female prison." *Id.* at 893-95.

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[12] On December 7, 2000, the district court bifurcated the issue of damages and stayed discovery pending the resolution of the issue of liability.

Additionally, the district court determined that reasonable alternatives to the MDOC's plan exist. Specifically, it stated that the Securicor study identified a number of reasonable alternatives—in particular, covering vacancies with females, increasing female coverage where necessary with overtime, and redeploying female officers in supervisory positions—which the MDOC had not explored. *Id.* at 895. Additionally, it noted that the MDOC had not made efforts to enhance pre-employment screening to lessen the likelihood of employing high-risk male COs and RUOs in female prisons. *Id.* The court stressed, however, that nothing in its decision "should be read to prohibit the MDOC officials from making gender specific task assignments." *Id.* at 899. The MDOC and Martin, as well as the intervening defendants, timely appealed.

ANALYSIS

The district court erred in finding that the female gender is not a BFOQ for the positions of CO and RUO in the housing units at MDOC's female facilities.[13] Title VII of the Civil Rights Act of 1964 broadly proscribes gender-based discrimination in the workplace. *See Grant v. Gen'l Motors Corp.*, 908 F.2d 1303, 1306 (6th Cir. 1990). The MDOC concedes that it has adopted a facially discriminatory plan, and this case therefore "turn[s] on whether such overt disparate treatment is for some reason justified under Title VII." *Reed v. County of Casey*, 184 F.3d 597, 599 (6th Cir. 1999) (internal quotation omitted). Title VII permits overt discrimination if the disparate treatment is based on a bona fide occupation qualification, or BFOQ. *Id.*

The BFOQ defense countenances gender-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the

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[13] Because we find that gender is a BFOQ, we need not address the defendants' alternative argument that the plaintiff's Title VII claim fails for lack of an adverse employment action by the MDOC.

normal operation of that particular business or enterprise."[14] 42 U.S.C. § 2000e-2(e) (2001). It is true that the BFOQ defense is written narrowly, and is to be read narrowly. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). Moreover, the burden is on an employer to establish a BFOQ defense. *Grant*, 908 F.2d at 1306.

Courts have offered various formulations of the BFOQ defense, *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977), and from these decisions we distill the principles that lead us to the conclusion that the defense has been established in this

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[14] The Elliot-Larsen Act parallels Title VII. Section 202(1)(a) of the Elliott-Larsen Act provides

> An employer shall not do any of the following: . . . Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex . . . .

Mich. Comp. Laws Ann. § 37.2202(1)(a) (West 2001). The Elliott-Larsen Act also includes a "BFOQ" defense, which reads

> A person subject to this article may apply to the commission for an exemption on the basis that . . . sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. . . . An employer may have a bona fide occupational qualification on the basis of . . . sex . . . without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

Id. § 37.2208.

Federal civil rights cases are persuasive rather than controlling authority in determining the proper interpretation of the Elliott-Larsen Act. *Bryant v. Automatic Data Processing, Inc.*, 390 N.W.2d 732, 734 (Mich. Ct. App. 1986). However, the parties have not identified any relevant substantive differences between Title VII and the Elliott-Larsen Act, and the parties and the district court have relied almost entirely on federal precedent. Accordingly, we decide the plaintiffs' claim under the Elliot-Larsen Act on the same basis that we decide the plaintiffs' Title VII claim.

case. First, "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes," *id.*, and an employer must have a "basis in fact," *id.* at 335; for its belief that gender discrimination is "reasonably necessary"—not merely reasonable or convenient—to the normal operation of its business. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971); *see also Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (interpreting the BFOQ defense in the Age Discrimination in Employment Act ("ADEA")). Courts have variously stated that an employer can meet this requirement by showing that "all or substantially all [members of one gender] would be unable to perform safely and efficiently the duties of the job involved," *Johnson Controls*, 499 U.S. at 207 (quoting *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)); that "it is impossible or highly impractical" to determine on an individualized basis the fitness for employment of members of one gender,[15] *Harriss*

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[15] The plaintiffs maintain that the "impossible or highly impractical" standard applies only to the BFOQ defense set forth in the ADEA. They argue that the court should not import this "lower" standard into Title VII jurisprudence because (1) Title VII's BFOQ "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities," *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977), (2) the Supreme Court declined to adopt the standard for Title VII cases in *International Union, United Automobile, Aerospace and Agriculture Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and (3) the standard is premised on considerations unique to the aging process.

The plaintiffs' argument fails for a number of reasons. Most fundamentally, the "impossible or highly impractical" standard is not solely an ADEA standard. This language appears to have originated in a Title VII case, *Weeks v. So. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 n.5 (5th Cir. 1969), and subsequently to have been applied in ADEA cases. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 n.19 (1985). At least two circuits have utilized this language in Title VII cases. *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1981); *Weeks*, 408 F.2d at 235 n.5.

Moreover, even if the standard had not yet been applied in Title VII cases, precedent suggests that it should be. "The provisions of the ADEA generally receive an identical interpretation to corresponding provisions of Title VII," *Lilley v. BTM Corp.*, 958 F.2d 746, 750 n.2 (6th Cir. 1992), and Title VII and the ADEA define the BFOQ defense in materially indistinguishable terms. *Compare* 29 U.S.C. § 623(f)(1) (2001) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."), *with* 42 U.S.C. § 2000e-2(e) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . is a bona fide occupational reasonably necessary to the normal operation of that particular business or enterprise. . . ."). In fact, the Supreme Court has observed that Congress borrowed the concept and statutory language from Title VII's BFOQ defense in composing the ADEA's BFOQ defense, and the Court has used Title VII and ADEA case law interchangeably. *Johnson Controls*, 499 U.S. at 201; *Criswell*, 472 U.S. at 412, 416.

The plaintiffs' arguments against applying the "ADEA" standard in Title VII cases—the plaintiffs do not acknowledge the lineage of the "impossible or highly impractical" standard—are not persuasive. The Court has read the ADEA's BFOQ defense, "which tracks the BFOQ provision in Title VII, just as narrowly." *Johnson Controls*, 499 U.S. at 201. The *Johnson Controls* decision concerned whether the employer's asserted BFOQ related to the "essence" of the employer's business, and did not purport to hold that an employer can establish "reasonable necessity" only by showing that "all or substantially all woman would be unable to perform safely and efficiently the duties of job involved." *Johnson Controls*, 499 U.S. at 206-07 (internal quotations omitted). The plaintiffs fail to identify the "considerations unique to the aging process" that require a departure from the usual practice of interpreting Title VII and the ADEA in identical fashion.

In short, the BFOQ defense has not been reduced to a single, universally-applicable test. The "all or substantially all" and "impossible or highly impractical" standards are, to use the language of *Dothard*, 433 U.S. at 333, "formulations" of the "reasonable necessity" requirement, not hard-and-fast rules of law. These tools may or may not assist a court in evaluating the facts of the particular case before it. In the instant case, both standards have helped guide our analysis, but our decision does not turn on the use of either standard.

v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980) (quoting *Weeks*, 408 F.2d at 235 n.5); or that "the very womanhood or very manhood of the employee undermines his capacity to perform a job satisfactorily," *Torres v. Wisc. Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1528 (7th Cir. 1988) (en banc). Second, the Supreme Court has stressed that "in order to qualify as a BFOQ, a job qualification must relate to the essence, or to the central mission of the employer's business." *Johnson Controls*, 499 U.S. at 203 (internal citations and punctuation omitted). Third, this court imposes on employers asserting a BFOQ defense the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex. *Reed*, 184 F.3d at 600.

In reaching the conclusion that the female gender is a BFOQ for the CO and RUO positions in this case, we are aided by a series of cases that directly address the issue of gender as a BFOQ for corrections officers in female correctional facilities. *Reed*, 184 F.3d at 600; *Robino v. Iranon*, 145 F.3d 1109, 1110-11 (9th Cir. 1998); *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 226 (8th Cir. 1995); *Torres*, 859 F.2d at 1532. These decisions teach that the reasoned decisions of prison officials are entitled to deference and that the goals of security, safety, privacy, and rehabilitation can justify gender-based assignments in female correctional facilities.

Because of the unusual responsibilities entrusted to them, the redoubtable challenges they face, and the unique resources they possess, the decisions of prison administrators are entitled to a degree of deference, even in the Title VII context. As the Seventh Circuit, sitting en banc, observed, prison officials

> must grapple with the "perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society

> with an improved chance of being useful, law-abiding citizens."

Torres, 859 F.2d at 1529 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981)). To meet this daunting task, the court continued, "prison administrators always have been expected to innovate and experiment. Unless prison administrators try new approaches, the 'intractable problems' will remain and the lot of the incarcerated individual will not improve. Indeed, it probably will deteriorate." *Id.* (internal citation omitted). Thus, the court concluded that, although the decisions of prison officials are not accorded as much deference in Title VII cases as they are in constitutional cases,[16] "their

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[16] In cases involving constitutional challenges to the actions of prison administrators, the Supreme Court has stressed repeatedly that the decisions of administrators are entitled to substantial deference. *See, e.g., Washington v. Harper*, 494 U.S. 210, 223-24 (1990); *Turner v. Safley*, 482 U.S. 78, 84-85, 89 (1987); *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986). In particular, "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests," even when "the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Harper*, 494 U.S. at 223 (internal quotation marks omitted). Behind this rule is the recognition that

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner, 482 U.S. at 84-85 (internal citations omitted).

judgments still are entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience." *Id.* at 1532; *see also Robino*, 145 F.3d at 1110 (holding that the professional judgments of prison administrators are entitled to deference); *cf. Tharp*, 68 F.3d at 226 (applying a "deferential balancing test" to constitutional component of plaintiffs' challenge to prison administrator's gender-based staffing assignments).

The district court distinguished *Torres* and its progeny on the ground that the MDOC's decision "reflected neither reasoned decision making nor professional judgment, but rather the consequence of a belief of one person, not a correctional professional, in a transitory position of authority, that it was best for the female prisons in Michigan." *Everson*, 222 F. Supp. 2d at 898. The court elaborated,

> The reason for this case is that Martin became director and he came to the position with a stereotypical view of the role of sex in employment in male and female prisons: males guard males and females guard females. Without consulting his staff and without a review of internal studies, national policies or the literature Martin, and Martin alone, decided the change was appropriate and the MDOC staff fell in line. Martin had no qualifications from past training[,] employment or experience to make a reasoned judgment on the subject and his leaving corrections as a profession simply confirms this.

Id. at 897. In defending the district court's ruling, the plaintiffs point to the district court's findings that Martin did not consult with his staff, that the MDOC did not submit its BFOQ request to the Michigan Department of Civil Rights, and that the GSAC study did not recommend gender-specific assignments.

The district court committed legal error in concluding that the MDOC had forfeited the deference normally afforded

prison administrators. Cases may arise in which a prison official has acted so capriciously that his decision does not deserve deference, but the case at bar does not fall in this category. The MDOC was not obligated to follow any particular protocols in order to earn deference, and the district court applied too exacting a standard in dismissing the MDOC's deliberations as inadequate. In effect, the district court circumvented the rule of deference by second-guessing the procedures employed by the MDOC.

Though it did not exhaust its institutional resources, the MDOC made a considered decision that a BFOQ was necessary to address the grave problem of sexual abuse of female inmates. When Martin assumed the position of Director, the MDOC faced a pair of high-profile lawsuits and a chorus of public criticism charging that it had ignored, or covered up, widespread sexual abuse of its female inmates—a situation calling for prompt and decisive action. In the *USA* agreement, the MDOC agreed to study the feasibility of increasing the presence of female officers in the housing units,[17] and, in the *Nunn* agreement, the MDOC agreed to make a good faith effort to limit the assignment of staff in housing units to female officers. J.A. at 1255, 1266. The Securicor study, undertaken pursuant to the *USA* agreement, recommended that the MDOC "explore the re-deployment of all available female corrections officers . . . to housing units." J.A. at 994. Mahoney's report, which Martin commissioned prior to the MDOC's application for selective certification, recommended that only women be assigned to the CO and RUO positions in the housing, segregation, and intake units because, in Mahoney's opinion, only this action could ensure

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[17] Three experts for the DOJ in the *USA* lawsuit recommended that, consistent with Title VII's mandate of equal employment opportunity, the MDOC staff the housing units in its female facilities with female staff only, either permanently or until misconduct was reduced. J.A. at 4009-10, 4014, 4116, 4167.

safe and humane conditions of confinement and the professional operation of the MDOC's facilities. J.A. at 1441. Additionally, Martin testified that he consulted with his staff about the plan prior to seeking selective certification and discussed privacy accommodations for female inmates with prison officials from other states. J.A. at 3307-08, 3314. Finally, the MDOC assembled an array of materials in support of its application for selective certification,[18] and the MDCS approved the application.[19] Clearly, the MDOC's plan was "the product of a reasoned decision-making process," *Torres*, 859 F.2d at 1532, and not simply the result of Martin's whim.

The procedural shortcomings identified by the district court do not dictate a contrary conclusion. The district court apparently reasoned that, because Martin had a limited background in corrections,[20] because Martin did not consult with the wardens of the female facilities before adopting the plan, because the MDOC did not seek approval from the Michigan Department of Civil Rights, and because the GSAC study did

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[18] The materials included a summary of disciplinary action taken against MDOC employees for sexual abuse, data on practices in female prisons in other states, descriptions of the duties of COs and RUOs in the unit in Michigan's RUOs in the housing s female facilities, applications for a BFOQ for officer positions at a women's prison prepared by Wisconsin corrections officials, expert reports from the *USA* lawsuit, the GSAC study, the Securicor study, the Mahoney report, and the *USA* and *Nunn* agreements. J.A. at 3729-4203.

[19] The district court found that the Department of Civil Service "rubber-stamped" the MDOC's application. *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864, 878 (E.D. Mich. 2002). We find this conclusion, which was based solely on the fact that the approval took twelve days, unwarranted.

[20] Prior to his appointment as director of the MDOC, Martin's only experience in corrections was his four years of service on the Corrections Committee of the Michigan House of Representatives while a state legislator.

not recommend a BFOQ, the plan did not reflect the institutional expertise of the MDOC and, hence, did not merit deference. However, as discussed above, the evidence shows that Martin drew on some, though not all, of the resources and expertise of the MDOC in the course of settling the USA and *Nunn* lawsuits and formulating the plan. Moreover, the district court failed to recognize that courts defer to the judgments of prison administrators not simply because of their expertise. Additional reasons counsel in favor of a policy of judicial restraint: the ability of administrators to plan and muster resources, the primary nature of the executive—as opposed to the judicial—branch of government to run the prisons, and the respect owed to state sovereignty by the federal judiciary. *Cf Turner v. Safley*, 482 U.S. 78, 85 (1987). These considerations apply whether or not Martin acted unilaterally. Finally, none of the irregularities identified by the district court vitiated the MDOC's decision-making process. A prison official need not run his department as a participatory democracy nor build "unanimity of opinion" to win deference. *Torres*, 859 F.2d at 1532. Neither the district court nor the plaintiffs explain what sort of penological expertise the Michigan Department of Civil Rights would have contributed, and there was no statutory requirement that the MDOC obtain approval from the Department of Civil Rights. Mich. Comp. Laws Ann. § 37.2208 (West 2001). To bind the MDOC to the recommendations of the GSAC, which were made before Martin became Director and before the *USA* and *Nunn* agreements, would, in violation of *Torres* and its progeny, deprive the MDOC of the freedom to evolve and innovate.[21] In short, in closely scrutinizing the decision-making process of the MDOC, the district court effectively rendered the rule of deference a nullity.

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[21] Additionally, the GSAC's recommendations rested, at least in part, on the conclusion that gender-based assignments were not a viable option "due to the labor pool and union contracts"—a conclusion silent as to the penological soundness of gender-based assignments. J.A. at 3933.

Application of the correct legal standard, which mandates that we give due regard to the professional judgment of the MDOC, makes it clear that the female gender is a BFOQ for the CO and RUO positions in the housing units at female prisons in Michigan. Viewed in proper perspective, the exclusion of males from these positions is "reasonably necessary" to "the normal operation" of the MDOC's female facilities. The MDOC reasonably concluded that a BFOQ would materially advance a constellation of interests related to the "essence" of the MDOC's business—the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates—and reasonable alternatives to the plan have not been identified.

Unquestionably, the security of the prisons relates to the essence of the MDOC's business, and the MDOC maintains that the presence of male COs and RUOs in female housing units imperils security in a number of ways. First, the presence of males in the housing units necessitates the use of "artificial barriers to security" such as covers for cell windows, doors on the toilet stalls, shower curtains, the moratorium on pat-down searches by male officers, and the "knock and announce" policy.[22] Second, allegations of sexual abuse,

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[22] George Camp, a former corrections official and currently a corrections consultant, testified that these artificial barriers to security "give inmates an opportunity to manipulate behind that, to do things that they ought not to be doing, for the staff not to be aware, not to interact with them, and I think that runs counter to being alert, observant, and in the know, and you have to have that." J.A. at 3110. He further testified that "[o]nce you abandon any part of the turf at any time or any place, you have sent a signal that this belongs to the inmates and it cannot, and once you do that, it leads to a creeping and eroding of the legitimate rights, the legitimate obligation of a prison staff to be everywhere, to be informed, to be alert." J.A. at 3111. Similarly, Annabelle Romero, who worked as a consultant for the DOJ in connection with the *USA* Lawsuit, described the shades for cell windows as "a Band-Aid approach" that prevents officers from "accomplishing 100 percent of their duties" and "creates a security hazard for both the officers and the inmates." J.A. at 3373-74. Likewise,

whether true or not, create a "poisoned atmosphere" that breeds misconduct on the part of inmates and guards.[23] Third, many male officers, afraid of false accusations of sexual

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Director Martin testified that "[a]ny time you put barriers in a facility from observation, direct observation, it puts I think inmates and staff at certain risk. For instance, if a window curtain is up on a cell door and an officer, male or female, it doesn't matter, can't see in, there's no way we can intervene in a suicide attempt because we don't know that's going on. We just don't know what's behind it, and it seems contrary then to other recommendation that you put windows in other doors [so] that you can always see in." R. 114, Tr. at 166. Finally, Joan Yukins, the warden of the Scott Facility, criticized "t[ying] the hands of male corrections officers in the housing units" by means of the shades for cell windows and the moratorium on "pat-down" searches. R. 119, Tr. at 33. She stated that she thought "we can function better in those housing units with females in there being able to look over the curtains, go into bathrooms, go into the showers if necessary, pat down the prisoners in the housing units where they live." J.A. at 3620.

[23] Michael J. Mahoney, an expert for the DOJ in the *USA* lawsuit and the author of the Mahoney report, testified that "[t]he nature of [the] atmosphere in the correctional facility really relies upon the relationship between staff and prisoners, and allegations even when falsely made and in some cases particularly when falsely made can have a negative impact on that kind of an atmosphere. It increase[es] friction. It increases mistrust. It puts both staff and inmates into a 'we and they' game, and I think in those situations it only serves to . . . reduce[] the positive correctional atmosphere and increases the potential of fear, of negative inferences." J.A. at 3242. Relatedly, Patrick McManus, a corrections consultant responsible for monitoring the MDOC's compliance with the *USA* agreement, testified that "prisons need to have a level of trust, confidence, comfort between staff and prisoners if they are going to function well," and that "it was in [the housing units] that the mistrust, the fear between the female prisoners and the male staff, was the most prominent and where it was likely to be the most corrosive." J.A. at 3090. Similarly, Director Martin testified that allegations create "friction between staff and prisoners that is counterproductive to safety and security in the prison." J.A. at 3290. Finally, Yukins testified that "allegations of sexual misconduct by female [inmates] on the male officers ha[ve] a very detrimental effect to the institution and to the employees and the prisoners." J.A. at 3614.

abuse, become "gun-shy" and fail to monitor and discipline inmates in a proactive fashion.[24]

Giving due deference to the judgment of the MDOC, we agree that the MDOC's plan will significantly enhance security at the MDOC's female facilities. Support for the MDOC's position comes from *Dothard v. Rawlinson*, 433 U.S. 321 (1977), in which the Supreme Court held that the male gender was a BFOQ for prison guards in Alabama's maximum-security men's prisons. The environment in Alabama's penitentiaries was, in the words of the Court, "a peculiarly inhospitable one for human beings of whatever sex," characterized by "rampant violence" and a "jungle

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[24] George E. Sullivan, a corrections professional who had served as an expert for the DOJ in the *USA* lawsuit, testified that, in conversations with male officers at the Wayne Facility, the officers "were very candid in expressing their serious concerns, seeming even fearful of doing their jobs in the women's housing units risking a sexual harassment charge against them by female inmates. 'How could I explain such a charge to my wife or family,' asked one of them.'" J.A. at 3223. He opined that "male staff generally in women's prisons around the country, and especially at Western Wayne, do not, and will not (and in my opinion should not) conduct the security searches and procedures necessary to assure control over escape devices, weapons, illicit drugs, drug paraphernalia, and other serious contraband within the living spaces of female inmates. As a simple matter of their own self-consciousness and modesty, most male staff are very reluctant to search women's garments, personal care/sanitary items, observe them nude in showers or while using toilets." J.A. at 3224-25. Likewise, Camp testified that male officers "are tentative, that they are perhaps reluctant to engage female prisoners in a way that they would males to find out what was going on in a professional way, to be alert to the events in the institution or in the housing unit, to make rounds." J.A. at 3134. Finally, Mahoney testified that "[i]n order to run a facility, you have to supervise prisoners, and that requires observation on a regular basis. When staff may feel reluctant, particularly male staff, to view females in a state of undress, in the use of toilet facilities, in dressing, and other kinds of situations, they may reluctantly, not pursue vigorously their supervision requirements because of the natural reluctance to not do that." J.A. at 3243.

atmosphere." *Id.* at 334 (internal quotations omitted). Noting that inmates were housed in dormitories rather than cells, that inmates were not segregated according to their offense or level of dangerousness, and that an estimated 20% of inmates were sex offenders, the Court found "a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison," and it spotted "a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women." *Id.* at 335. The Court concluded,

> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employees very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Id. at 336. Similarly, in the instant case, a "basis in fact" exists that "privacy screens" preclude proper surveillance of inmates and that allegations of sexual abuse engender hesitancy in male officers and mistrust between inmates and guards, and thus the "very manhood" of male COs and RUOs undermines their capacity to provide security.

The safety of inmates also indisputably relates to the essence of the MDOC's business, and the MDOC believes that it must eliminate males from the CO and RUO positions in the housing units in order to safeguard female inmates from sexual abuse. The defendants state that males perpetrate most of the sexual abuse in its female facilities, noting that, according to the plaintiffs' calculations, between 1994 and 2000, 189 of 208 allegations of sexual misconduct—including all of the sustained allegations—were made against male (officer and non-officer) employees, while the remaining 19

allegations were made against female employees or non-employees. J.A. at 700. The defendants also claim that sexual abuse most frequently occurs in the housing units, noting that, according to the MDOC's figures, 39% of the allegations of sexual misconduct arose in housing units, and that, according to the testimony of a MDOC expert, 57% of "alleged incidents" occurred in housing units. MDOC Br. at 8-9; R. 112, Tr. at 82. The defendants further argue that corrections officers commit a majority of the sexual abuse, noting that, according to the plaintiffs' figures, 125 of 208 allegations of sexual misconduct were lodged against male officers. J.A. at 700. Finally, while conceding that the vast majority of male COs and RUOs conduct themselves professionally, the MDOC contends that it cannot predict which officers will engage in sexual abuse.

The MDOC has established that the exclusion of male COs and RUOs from the housing units will decrease the likelihood of sexual abuse. As we have emphasized, the MDOC's decision receives "substantial weight," *Torres*, 859 F.2d at 1532, and, given the severity of the harm to sexually abused inmates, the MDOC may set "more stringent" qualifications for officer positions. *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980) (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)). As the data cited above shows, some male officers possess a trait precluding safe and efficient job performance—a proclivity for sexually abusive conduct that cannot be ascertained by means other than knowledge of the officer's gender, and thus gender was "a legitimate proxy" for a safety-related job qualification. *Cf. Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414-15 (1985) (applying "legitimate proxy" standard in an ADEA case. As the Ninth Circuit found in analogous circumstances, MDOC's decision to designate certain positions as female-only was "a reasonable response to concerns about inmate privacy and allegations of abuse by male

[officers]." *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998).

The district court erred in concluding that the safety interests of female inmates did not support a BFOQ. The court reasoned that the MDOC's plan was not reasonably necessary because the MDOC had only recently implemented the reforms mandated by the *USA* and *Nunn* agreements, because improper conduct had decreased since the implementation of the reform, and because only a minuscule percentage of male officers sexually abuse inmates.[25] *Everson*, 222 F. Supp. 2d at 894-95. Further, the court relied on the lack of effort "to enhance pre-employment screening of new CO's and RUO's to lessen the likelihood of employing high risk male CO's and RUO's in the female prisons." *Id.* at 895.

The district court applied too restrictive a standard in rejecting the MDOC's safety-based argument. Apparently, the court thought that the MDOC could establish a BFOQ only by showing that "all, or substantially all, males are not able to perform safely and efficiently the duties of a CO and RUO in the housing units in the female prisons." *Id.* However, as discussed above, the "all or substantially all" standard represents just one formulation of the "reasonable necessity" requirement, and the "impossible or highly impractical" standard better suits the instant case. No amount of sexual abuse is acceptable, and, given the gravity of the harm visited on the victims of sexual abuse, the MDOC permissibly

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[25] The district court found that allegations of "improper conduct" declined from 57 in 1998 (22 of which were sustained), to 40 in 1999 (of which 3 were sustained), to 25 in 2000 (none of which were sustained). *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864, 887 (E.D. Mich. 2002). The court did not identify the source of this data, define what constitutes "improper conduct," or explain whom the allegations were made against. *Id.* The plaintiffs state that, between 1994 and 2000, only 1.3% of the total number of male officers were involved in sustained allegations of sexual misconduct. Everson Br. at 39.

eschewed the "wait-and-see" approach commended by the district court. None of the parties claims that the reforms mandated by the *USA* and *Nunn* agreements will completely eradicate sexual abuse, and the MDOC acted within the narrow confines of the BFOQ defense when it undertook a policy reasonably calculated to bring sexual abuse to an irreducible minimum.

The district court also erred in concluding that pre-employment screening constituted a reasonable alternative to a female BFOQ. Harley Stock, an expert for the plaintiffs, testified that the MDOC could reduce its risk of hiring applicants likely to engage in sexual abuse by instituting psychological testing and making other changes in its pre-employment screening. However, Stock conceded that (1) the tests he proposed do not measure a subject's proclivity for sexual abuse specifically, but instead place subjects into high risk categories that "might include such things as inappropriate sexual behavior" or assess "the ability to relate to members of the opposite sex," (2) he had not conducted follow-up studies to assess the accuracy of his testing methods, (3) his proposed testing is valid only for a year, and (4) he saw the testing of current employees as a "problem." R. 116, Tr. at 40-43, 47, 54-55. Given its speculative value, and its limited applicability, testing does not qualify as a reasonable alternative to gender-specific assignments.

The privacy rights of Michigan's female inmates also weigh in favor of a BFOQ. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. "Thus, while inmates may lose many of their freedoms at the prison gate, they retain 'those rights [that are] not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.'" *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (quoting *Hudson v. Palmer*, 468 U.S. 517, 523 (1984)). Our court has recognized that "a convicted prisoner

maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners."[26] *Cornwall v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992); *see also Kent v. Johnson*, 821 F.2d 1220, 1227 (6th Cir. 1987) (assuming that "there is some vestige of the right to privacy retained by state prisoners and that this right protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex"). As one of our sister circuits has explained, most people "have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary,

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[26] This court has found the "privacy" right against the forced exposure of one's body to strangers of the opposite sex to be located in the Fourth Amendment. *Cornwall v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992); *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987). Other courts have described this rightas a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment. *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992) (relying upon *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1981)); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *Rushing v. Wayne County*, 462 N.W.2d 23, 30 (Mich. 1990). Additionally, under certain circumstances, the invasion of an inmate's bodily "privacy" can violate the inmate's Eighth Amendment rights. For example, in *Jordan v. Gardner*, 986 F.2d 1521, 1531 (9th Cir. 1993) (en banc), the court held that a cross-gender clothed body search policy at a women's prison in Washington state constituted cruel and unusual punishment because many of the inmates had histories of sexual or physical abuse by men and because cross-gender bodily searches, even if conducted properly, would likely inflict psychological trauma on many of these inmates. Similarly, in *Kent*, 821 F.2d at 1227-28, this court held that a male inmate had stated a claim under the Eighth Amendment for purposes of Rule 12(b)(6) of the Federal Rules of Civil Procedure by alleging that "female prison guards have allowed themselves unrestricted views of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy."

that sort of degradation is not to be visited upon those confined in our prisons." *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981); *see also York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").[27]

Courts have recognized that this privacy interest can justify the exclusion of male officers from certain positions in female prisons. In *Robino v. Iranon*, a Hawaii women's correctional center asserted that the female gender was a BFOQ for 6 out of 41 corrections officer positions at a women's correctional center because the restriction was reasonably necessary to accommodate the privacy interests of the inmates, and to reduce the risk of sexual conduct between the officers and inmates. 145 F.3d 1109, 1110 (9th Cir. 1998). The positions at issue raised privacy concerns in that they were "residential" and required the officer on duty "to observe the inmates in the showers and toilet areas for the prison's own security or provide[d] unsupervised access to the inmates." *Id.* at 1111. Accepting the BFOQ argument, the court found the policy "a reasonable response to the concerns

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[27] Of course, as important this right may be, it must yield to the needs of prison administration. Thus, courts evaluate prison policies that infringe on the privacy rights under a "rational relationship" that provides that a policy is valid if "reasonably related to legitimate penological interests." *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Factors to consider in applying this standard include, "(1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest . . . ; (2) the existence of alternative means for inmates to exercise their constitutional rights; (3) the impact that accommodation of these constitutional rights may have on other guards and inmates, and on the allocation of prison resources; and (4) the absence of ready alternatives as evidence of the reasonableness of the regulation." *Id.* at 917.

about inmate privacy and allegations of abuse by male [officers]." *Id.* Similarly, in *Tharp v. Iowa Department of Corrections*, the court upheld a policy that assigned only female officers to the women's unit of a mixed-gender minimum security prison in Iowa. 68 F.3d 223, 224 (8th Cir. 1995). Among other duties, the officers conducted room searches, urinalysis tests, and strip and pat-down searches of inmates, though only female staff—either female officers or, if none were available, less trained female staff—conducted urinalysis and personal searches. *Id.* Without even reaching the BFOQ issue, the court deemed the policy a "reasonable gender-based job assignment policy" because, among other things, it addressed "female inmate privacy concerns." *Id.* at 226; *see also Carl v. Angelone*, 883 F. Supp. 1433, 1442 n.3 (D. Nev. 1995) (stating that a BFOQ might be justified on the ground of "simple decency in order to afford female inmates as much privacy as possible, even if not constitutionally mandated or protected").[28]

The MDOC's policy similarly advances the privacy interests of Michigan's female inmates. The housing unit serves as inmates' "home," the place where they "let their hair down" and perform the most intimate functions like "like showering, using the toilet, dressing, even sleeping." J.A. at 3089, 3371. In the housing units, inmates spend a great deal of time in close contact with the officers, who supervise "the most intimate aspects of an inmate's life in prison, what time they go to sleep, where they sleep, when they get up, brush their teeth, use the restroom, shower, dress." J.A. at 3369; *see also*

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[28] We note that courts have identified "privacy" as a basis for a BFOQ in other contexts as well. *See, e.g., Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996) (child care specialist at psychiatric hospital); *Hernandez v. Univ. of St. Thomas*, 793 F. Supp. 214, 218 (D. Minn. 1992) (janitor in female dormitory); *Local 567 Am. Fed. of State, County, & Mun. Employees v. Michigan Council 25*, 635 F. Supp. 1010, 1014 (E. D. Mich. 1986) (attendants at mental health care facility).

J.A. at 3291, 3368. Inmates must request sanitary napkins and other personal items from the officers. J.A. at 3565. Given these circumstances, the MDOC, in Martin's words, determined that "sound correctional practices" and "simple human decency" dictated the exclusion of males from CO and RUO positions in the housing units. J.A. at 3292.

The MDOC has instituted "privacy screens" to address the most severe invasions of privacy, but these measure are not failsafe. The MDOC has provided inmates with screens for their cell windows, but these screens do not cover the entire window and a male of "average height" can see over them. J.A. at 3147; *see also* J.A. at 3154. Officers can also see over the doors on the toilet stalls. J.A. at 3531. Opaque curtains shield inmates from view while they shower, but they are exposed when they reach outside the stall for a towel. R. 118, Tr. at 170, 242; *see also* R. 120, Tr. at 33-34; J.A. at 3564. Finally, although male staff are required to knock and announce before entering places where female prisoners are likely to be in a state of undress, such as a bathroom or a shower facility, the "announcements" are frequently inaudible to the inmates. R. 118, Tr. at 243; J.A. at 3378. Thus, even with these privacy screens, prurient male officers have ample opportunity to gaze upon inmates in a state of undress, and even the most professional officers are liable to intrude on the privacy of inmates unintentionally. Moreover, these privacy screens do not address the fear of unwanted viewing experienced by many inmates, some of whom have a history of physical or sexual abuse by men.

The MDOC has made a reasonable determination that its plan will protect the privacy rights of its female inmates. Regardless of whether its current conditions violate the constitutional rights of its inmates, a prison may invoke the BFOQ defense to justify measures taken to enhance inmate privacy. *Robino*, 145 F.3d at 1111; *Carl*, 883 F. Supp. at 1442

n.3. Thus, the goal of "privacy" provides support for the MDOC's BFOQ defense.

In rejecting the MDOC's privacy-based argument, the district court erroneously determined that inmate privacy did not go to the "essence" of the MDOC's business. The court found that "there is nothing in any publication of the MDOC to suggest that the 'privacy of prisoners, especially female, as the term is conventionally used, is a mission of the MDOC.'" *Everson*, 222 F. Supp. 2d at 878. But, as quoted a few pages earlier in the court's opinion, the "position descriptions" for the CO and RUO positions state that the "goal is to provide a safe, clean, secure, and efficient living environment *while respecting the privacy of female prisoners*, and enforcing rules and regulations." *Id.* at 867; J.A. at 3737, 3744, 3756 (emphasis added). Additionally, in his report, Mahoney stated that the MDOC has hired him "to determine whether certain custody positions at . . . women's facilities should be filled only by female custody staff or if there is a less intrusive means to ensure the safety and *reasonable privacy needs* of female inmates." J.A. at 1426 (emphasis added). More importantly, when determining whether a particular job qualification relates to the "essence" of the employer's business, a court must undertake a functional analysis of the employer's business, and not simply look to the employer's mission statement or other documentation. Here, given the MDOC's legal responsibility to safeguard the privacy rights of its inmates, Director Martin's statement that respecting the privacy interests of female inmates represents "sound correctional practice" and "basic human decency," and our common-sense understanding of corrections practice, it is beyond cavil that "privacy" relates to the essence of the MDOC's business.

In rejecting the MDOC's argument for a BFOQ, the district court stressed that the MDOC's plan departed from national norms. The court found that "standard practices nationwide

provide for the employment of male corrections officers in female prisons" and that "there is nothing unique about the operation of the female prisons in Michigan." *Everson*, 222 F. Supp. 2d at 893. The court further found that "the published literature on the presence of male correctional officers in female prisons does not support a female BFOQ for corrections officer in the housing units in a female prison." *Id.* at 894. In short, the court reasoned that, because the MDOC's plan deviated from standard practice, the plan was not reasonably necessary to the normal operation of Michigan's female prisons.

The district court committed legal and factual error by using standard practice as a yardstick for the reasonable necessity of the MDOC's plan. In determining whether gender-based discrimination constitutes a BFOQ, a court must examine the particular circumstances of the individual employer, and not simply rely on generalizations about an industry or a group of employers, as the district court did. *See Dothard*, 433 U.S. at 336 n.23; *Torres*, 859 F.2d at 1529. Additionally, "appraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used" to establish a BFOQ. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996); *see also Torres*, 859 F.2d at 1531; *cf. Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir.1996) (substantial deference accorded to experts in a constitutional challenge to state's hiring preference for African-American lieutenants in penal boot camp). Both of these precepts are especially true where the employer is a prison administrator that "must be allowed to adopt innovative solutions to the intractable problems of prison administration." *Torres*, 859 F.2d at 1529 (quoting *Turner v. Safley*, 482 U.S. 78, 107 (1987)). Placing the straightjacket of standard practices on prison officials, as the district court did, would deprive of them of the ability "to innovate and experiment," to the detriment of the inmates and society in general. *Id.*

In addition to this legal error, the district court clearly erred in finding "nothing unique" about Michigan's female prisons. In reaching this conclusion, the district court inexplicably failed to address Michigan's deplorable record regarding the care of its female inmates, which, absent evidence to the contrary, we must assume sets it apart from other states. In light of the endemic problem of sexual abuse, it was incumbent upon the MDOC to act decisively and creatively, and the lessons of *Torres* apply with special force. As Martin testified, and as we agree,

> the [MDOC's] plan to assign only females in the housing units . . . challenges the thinking of the past 15 years or so that officers are officers and prisoners are prisoners no matter what their gender, but the [MDOC's] staff and prisoners have paid a high price for going along with this conventional wisdom and I believe that I should be given the flexibility to exercise my best judgment on staffing the housing units to make our female prisons as safe and secure as they can be for the staff, the prisoners, and the public.

J.A. at 3295. In brief, given the case-by-case nature of the BFOQ analysis, the flexibility afforded prison administrators, and the MDOC's unique history, the lack of a national consensus does not mean that the female gender is not a BFOQ for CO and RUO positions in Michigan's female prisons.

The district court also erred in finding that there are "reasonable alternatives" to the MDOC's plan. As noted above, an employer invoking the BFOQ defense has the burden of establishing that there are no reasonable alternatives to discrimination. *Reed*, 184 F.3d at 600. In addition to pre-employment screening, which is discussed above, the district court identified the following alternatives to female-only staffing of the CO and RUO positions in the housing units: covering vacancies with females; increasing female coverage where necessary with overtime; redeployment of

female officers in supervisory positions; and eliminating the policy that each CO and RUO conduct five pat-down searches per shift. *Everson*, 222 F. Supp. 2d at 895.

The MDOC has demonstrated that the district court erred in deeming these proposals "reasonable alternatives" to gender-specific staffing. First, the proposal to fill vacancies with female officers is simply a watered-down version of the MDOC's plan; the district court did not explain why it is permissible under Title VII to move to female-only staffing-in the housing units through attrition but not through the immediate transfer of males to other positions. Second, increasing coverage with overtime is self evidently expensive and inefficient. In fact, the Securicor study—the source of the proposal stated that increasing coverage with overtime "is not a satisfactory long-term solution" for many reasons, including "the amount of time spent by supervisors to schedule overtime, staff burnout, and decreased staff effectiveness, as well as the fiscal cost of overtime." J.A. at 989; *see Reed*, 184 F.3d at 600 (holding that an option that would place "financial strains" on a county jail by requiring the payment of overtime, and that would "cause fatigue" in a jail employee, was not a reasonable alternative). Third, neither the district court nor the plaintiffs have explained how the redeployment of female supervisors to the housing units at the female prisons would cure problems stemming from the very presence of male COs and RUOs in the housing units. Fourth, the MDOC has already instituted a moratorium on pat-downs of female inmates by male officers, so this measure would not increase inmate safety or privacy. Moreover, the moratorium on pat-down searches impairs the ability of the male officers to protect the security of the prison and the safety of the inmates.

Before concluding, we emphasize the limited nature of our holding. We do not hold that gender constitutes a BFOQ for corrections officers in female prisons outside of Michigan.

Nor do we hold that gender constitutes a BFOQ for positions in Michigan's female prisons beyond the approximately 250 positions we have discussed. Nor do we have occasion to address whether the male gender can ever be a BFOQ for a corrections officer position at a male prison. Rather, we simply conclude that, given the endemic problem of sexual abuse in Michigan's female facilities, given the constellation of issues addressed by the MDOC's plan (security, safety, and privacy), and given the deference accorded the MDOC's judgment, the MDOC's plan is reasonably necessary to the normal operation of its female prisons.

CONCLUSION

The district court prefaced its decision with a famous quotation from Alexis de Toqueville: "There is hardly ever a political question in the United States which does not sooner or later turn into a judicial one." *Everson*, 222 F. Supp. 2d at 865 (quoting *Democracy in America* 248 (J.P. Moyer & Max Lerner eds., Harper & Row 1996) (1832)). This apothegm indeed illuminates the present dispute, though not in the manner suggested by the district court. The MDOC's appeal is before this court not because Director Martin "made a decision and tried to translate the decision into a courtroom judgment," *id.* at 899, but rather because, among other errors, the district court failed to accord proper deference to the decision of a state political actor, the MDOC, when individuals challenged that decision by filing suit in federal court rather than through the political process. For this reason, and for the other reasons discussed above, we REVERSE the judgment of the district court and REMAND with instructions to dismiss the complaint.

DISSENT

RONALD LEE GILMAN, *Circuit Judge*, dissenting. I disagree with the majority's conclusion that being a female is a bona fide occupational qualification (BFOQ) for approximately 250 Correctional Officer (CO) and Residential Unit Officer (RUO) positions in prisons for women inmates managed by the Michigan Department of Corrections (MDOC). In reaching its conclusion, the majority repeatedly stresses the importance of giving "due regard to the professional judgment of the MDOC." Although the judgments of prison officials are "entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience[,]" *Torres v. Wis. Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1532 (7th Cir. 1988) (en banc), the factual findings of the district court following a bench trial are also entitled to substantial deference. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

The district court made several key findings of fact that I believe have not been adequately considered by the majority. First, the district court concluded that standard-practice in the corrections field is to allow the employment of males in female prisons, even though the male employees may be limited in the scope of the tasks that they are permitted to perform. Second, the court found that internal studies by the MDOC did not support the wholesale elimination of male COs and RUOs from the housing units in the female prisons. The studies recommended that various tasks be assigned on a gender-specific basis and that the number of female COs be increased in the female housing units, but they did not recommend a female BFOQ for these positions. Third, the court concluded that the professional concern over cross-gender supervision in Michigan prisons was essentially limited to that of Bill Martin, the then-current director of the MDOC who requested the BFOQ certification. Martin was not someone with extensive experience in prison policy and

administration, nor did he consider the recommendations of the department's internal studies or consult with other senior managers of the MDOC.

Despite these factual findings by the district court, the majority has accepted the conclusion that gender is a BFOQ in this case, a determination reached by Martin and "rubber-stamped" by the MDOC without-consultation or study. Unlike the situation in *Robino v. Irano*, 145 F.3d 1109 (9th Cir. 1998), upon which the majority relies, the MDOC did not "conduct[ ] an extensive survey of post duties before determining which posts should be designated female-only." *Id.* at 1111. The MDOC's BFOQ determination, because it was not the "product of a reasoned decision-making process, based on available information and experience[,]" *Torres*, 859 F.2d at 1532, should be afforded less deference than we would otherwise give the professional judgment of prison officials.

I also believe that the majority's reliance on the *Torres* decision is unjustified. At issue in *Torres* was whether the district court erred in rejecting the prison officials' contention that a female BFOQ for correctional officer positions was necessary to further the goals of inmate rehabilitation, security, and privacy. 859 F.2d at 1526. The Seventh Circuit held that, with respect to the goal of inmate rehabilitation, the district court had erred in requiring the defendants to produce objective, empirical evidence of the need for a BFOQ, and remanded the case so that the district court could consider the totality of the circumstances. *Id.* at 1532. But with respect to the goals of security and privacy, the court affirmed the district court's determination that the various methods the prison had adopted to address the privacy concerns of female inmates, such as the use of "privacy cards" and limiting male guards' observation of unclothed female inmates, had not undermined prison security. *Id.* at 1526; 1528. It explained that "the decision of the district court that the defendants' BFOQ plan cannot be justified by concerns for prison security or for the

basic privacy rights of the inmates is correct in law and fact." *Id.* at 1528 (emphasis added).

Here, however, the majority concludes that the female BFOQ is necessary to advance the goals of prison security and prisoner safety, even though the district court determined that changes implemented as a part of the settlement agreements referred to in the majority opinion—including the "knock and announce" policy, restricting pat-down searches of inmates by male staff, and limiting male officers' views of areas where inmates dress, shower, and use the toilet—made a female BFOQ unnecessary. Thus, although *Torres* stands for the proposition that the reasoned judgment of prison officials should be given special consideration, it also supports the district court's conclusion that a female BFOQ is not necessary or appropriate for the purposes of prison security and privacy rights.

Finally, I believe that the district court was correct when it called for the use of "a scalpel rather than a meat ax approach to staffing tasks in the female prisons." *Everson v. Mich. Dept of Corr.*, 222 F. Supp. 2d 864, 896 (E.D. Mich. 2002). A reasonable alternative to the complete exclusion of males from the CO and RUO positions is the assignment of sensitive tasks to female correctional officers. In concluding its opinion, the district court held that

> there is no justification for a blanket ban on employment of male corrections officers in the female prisons of Michigan. The MDOC has the right to limit certain tasks in the female prisons to female corrections officers, particularly to ensure female inmates' rights to privacy[,] bearing in mind at all times the security interest of the corrections officers. . . . There are tasks in the running of a female prison as has been explained above which should not be performed by male correction officers such as strip searches and body cavity searches. It should not be difficult to define these tasks and adjust CO and

> RUO duties in the housing units in the female prisons accordingly. Nothing in the decision here to deny the BFOQ's requirement should be read to prohibit the MDOC officials from making gender specific task assignments. The vast majority of female prisons in the United States appear to manage their populations safely and efficiently and still comply with the requirements of equal employment opportunity laws. Nothing in the record here suggests the MDOC can not do the same thing.

Id. at 898-99. I fully agree with this assessment.

Other courts that have addressed this precise issue have reached the same conclusion. *See, e.g., Forts v. Ward*, 621 F.2d 1210,1216-17 (2d Cir. 1980) (affirming the portion of the district court's decision that balanced the conflict between male guards' employment rights and female inmates' privacy rights by "carefully tailored adjustments to either facilities or work assignments[,]" and vacating that portion of the decision that categorically prohibited the assignment of male guards to nighttime shifts); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir. 1980) (holding that in order for a male prison to show that the hiring of women for guard positions was unworkable, the prison "must also demonstrate that it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of inmates and the nondiscrimination principle of Title VII").

Given that gender-sensitive task assignment is a preferred alternative to the wholesale exclusion of males from the positions in question, I believe that the majority has erred in holding that being a female is a BFOQ for those positions. The fact that the overwhelming weight of judicial authority agrees should make us all the more cautious in finding that a BFOQ exists in this case. Accordingly, I would AFFIRM the decision of the district court.

APPENDIX D

UNITED STATES DISTRICT COURT
E.D. MICHIGAN
SOUTHERN DIVISION

No. 00-73133

ROSLYN EVERSON, RANDY FOX, STENNIS GEORGE, BRENDA L. SEBASTIAN, and RICHARD IDEMUDIA,
Plaintiffs,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS,
Defendant,

and

LINDA NUNN AND TRACY NEAL, Intervening
Defendants.

July 11, 2002

DECISION

COHN, *District Judge*.

There is hardly ever a political question in the United States which does not sooner or later turn into a judicial one.[1]

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[1] Alexis de Toqueville *Democracy In America* 248 (J.P. Moyer and Max Lerner eds., Harper & Row 1996) (1832).

TABLE OF CONTENTS

		Page
I.	Introduction	867
	A. Nature Of The Case	867
	B. The Correctional Officer Positions	867
	C. Relief And Scope	867
	D. Decision And Preliminary Statement	868
	1. Decision	868
	2. Preliminary Statement	868
II.	The Statutes	869
	A. Basic Laws	869
	1. Federal Law	869
	2. State Law	869
	B. The Exemptions	869
	1. Federal Law	869
	2. State Law	870
III.	Precursors To The MDOC Effort To Make The Change	870
	A. The United States Case	871
	B. The Female Inmates Case	872
IV.	Request For The BFOQ	873
	A. Gender Specific Assignment Committee	873
	B. Director's Initiative	874
	C. The Application To The DCS	876
V.	The Case In Court Pre-Trial	878

TABLE OF CONTENTS—Continued

		Page
VI.	The Trial	879
	A. The Issue	879
	B. The Trial Generally	880
	C. The Witnesses	880
	1. Plaintiffs	880
	2. Defendants	881
	3. Intervening Defendants	885
	D. The Exhibits	885
	1. Plaintiffs' Relevant Exhibits	886
	2. Defendants' Relevant Exhibits	886
	3. Joint Exhibits	887
VII.	Statistics	887
VIII.	The Right Of Plaintiffs To Bring Suit	888
IX.	The BFOQ	889
	A. The Law Generally	889
	B. The Law Particularly	889
	1. Female Prison BFOQ	889
	2. No Reasonable Alternative	892
	3. Female Inmates Rights	893
X.	Findings	893
	A. Facts	893
	B. Reasonable Alternatives	895
	C. Continued Incidents	895

TABLE OF CONTENTS—Continued

		Page
XI.	The Intervening Female Inmates' Case	895
	A. "The Harm To Plaintiffs Is Speculative And At Most Minimal"	896
	B. "Since Plaintiffs Do Not Contest The Right Of MDOC To Make Gender Specific Tasking Assignments MDOC Is Entitled To Make The Tasks of CO And RUO's In The Housing Units Gender Specific"	896
	C. "Assigning Males To Housing Units Solely To Achieve Gender Neutrality In Employment And Without Regard To Gender Differences Has Proven To Be A Mistake"	896
	D. "MDOC Is Obligated To Take All Reasonable Steps To Prevent Abuses From Continuing In The Female Prisons"	897
	E. "Making Gender A BFOQ For Female Housing Unit Officers Is Reasonably Necessary To Achieve MDOC's Core Mission"	897
XII.	National Profile of Corrections Officers In Female Prisons	898
XIII.	Conclusion	898

I. Introduction

A. Nature Of The Case

In this case, male and female corrections officers working for the Michigan Department of Corrections (MDOC) challenge the Michigan Department of Civil Service's (DCS)[2] approval of the MDOC's request to make female gender a bona fide occupational qualification (BFOQ) for the positions of Correctional Officer (CO) and Resident Unit Officer (RUO) in the housing units in the female prisons in Michigan.[3] The challenge comes in the form of a request by five CO's and RUO's[4] for a declaratory judgment that gender specific assignment to the positions of CO and RUO violates Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and Section 207 of Michigan's Elliot-Larsen Civil Rights Act, M.C.L. § 37.2202.

In response, the MDOC says that the BFOQ exception in the statutes, found at 42 U.S.C. § 2000e-2(e)(1) and M.C.L. § 37.2208 applies to these positions, i.e. a gender specific qualification (female) for the positions is reasonably necessary to the normal operations of a female prison.

A group of female inmates in the custody of the MDOC are also parties to the case as intervening defendants. They too argue that only female correction officers should be permitted in female prisons.[5]

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[2] The Michigan Civil Service Commission, which heads the Department of Civil Service, *see* M.C.L. § 16.301, was not involved in the approval. The approval letters were signed by the Human Resources Manager of the Bureau of Human Resources Services of DCS.

[3] There are currently three female prisons in Michigan: Scott Correctional Facility (Scott), Western Wayne County Correctional Facility (Western Wayne) and Camp Brighton.

[4] Plaintiffs' motion for class certification, to which the MDOC has responded, has not been acted on by the Court.

[5] Additionally, the American Civil Liberties Union Fund of Michigan,

On September 28, 2000, the Court entered a temporary restraining order against implementation of gender specific assignment of CO's and RUO's in Michigan's female prisons, which continues in effect.

B. The Correctional Officer Positions

The General Summary of Function/Purpose of Positions in DCS language of a CO reads:

> Responsible for custody and security in a female housing unit. The goal is to provide a safe, clean, secure, and efficient environment while respecting the privacy of female prisoners, and enforcing rules and regulations.

The General Summary of Function/Purpose of Positions in DCS language for an RUO reads:

> Responsible for custody and security in a female housing unit, as well as treatment responsibilities, primarily on the day and afternoon shift. The goal is to provide a safe, clean, secure, efficient living environment while respecting the privacy of female prisoners, and enforcing rules and regulations.

C. Relief And Scope

Plaintiffs request the following relief:

> A declaratory judgment that to make gender-based assignments to the Corrections Officer positions, Resident Unit Officer positions, as well as rover and transport positions at the Scott Correctional Facility, Western Wayne Facility, and Camp Brighton Facility is unlawful as a violation of the gender discrimination provision of Title VII, the provisions of the Elliott-Larsen Act, and

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the Women Lawyers Association of Washtenaw County, and the American Friends Service Committee jointly filed a brief amici curiae in support of the MDOC's and female inmates' positions.

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[6]

On the date suit was filed, July 12, 2000, the MDOC operated two female prisons: Florence Crane Corrections Facility (Florence Crane), Scott and a female camp, Camp Branch. At that time, the MDOC was in the process of converting Western Wayne and Camp Brighton to female only prisons and closing down Florence Crane and Camp Branch. Approximately 267 CO and RUO positions are involved overall, of which approximately 60% are male.[7] A subset of the CO and RUO positions are transportation officer, intake officer, and rover.

D. Decision And Preliminary Statement

1. Decision

For the reasons which follow, which constitute the findings of fact and conclusions of law required by Fed.R.Civ.P. 52, the Court finds that plaintiffs are entitled to a declaration that the MDOC has failed to sustain its burden that gender is a BFOQ for CO and RUO's in the housing units in female prisons, that it is reasonably necessary to their normal operations, and that there is no reasonable alternative to employing female corrections officers in such positions. This

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[6] This Decision is limited to plaintiffs' statutory claims.

[7] There are 445 bargaining unit positions in the three female prisons. Of the 445 positions, 267 positions are held by CO's and RUO's, of which 94 are CO's and 174 are RUO's. Approximately 70 to 75 male corrections officers would be affected by the change. It is likely 23 would be transferred to other prisons and the remaining 47 would be otherwise affected. All of the 267 affected positions could lose opportunities for overtime work and promotion. The MDOC has publicly stated it would endeavor to keep dislocations to a minimum. The MDOC and the Michigan Corrections Organization (MCO), SEIU Local 526M, AFL-CIO, the bargaining agent for the corrections officers, have apparently never engaged in any meaningful discussions about the proposed change.

is not to say, however, that in the staffing of such positions the MDOC may not, where security and personnel implications are involved for both the CO's and RUO's and the female inmates, exercise discretion to make female gender specific assignments for certain *tasks*.[8]

2. Preliminary Statement

At the conclusion of trial, the Court made preliminary findings which are memorialized in the Memorandum filed March 23, 2001, stating:

> The Court is dissatisfied with the record as it stands now, as a basis for decision. The Court's appointment of an expert, under Fed.R.Evid. 706, is desirable to examine, and report to the Court on, the privacy interests of female prisoners. The parties are entitled to comment. The proposed expert and scope of the expert's activity was named in the record, as well as the Court's expectations of the expert witness. What is necessary for
>
> the Court, in its decision, is to strike the right balance among the following fundamental principles:
>
> > First, there should be no blanket ban on the employment of one sex in a prison for members of the opposite sex;
> >
> > Second, prison employees who are not permitted to perform certain tasks because of their gender should not suffer adverse consequences in their pay or benefits, promotion opportunities, or job security;

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[8] One of the themes running through this case are limitations imposed by the collective bargaining agreement governing the affected corrections officers and, indeed, most of the employees of the MDOC. Where security and personnel implications are involved it does not seem that these limitations should be a barrier. Dealing with this, however, is for another day.

> Third, gender classification should be used only where there are no reasonable and adequate gender-neutral means for advancing legitimate penal purposes; and
>
> Fourth, there may be special circumstances in which job assignments must be limited on the basis of gender to insure inmates' rights to personal security and privacy.

See Memorandum, filed March 23, 2001, at p. 10-11.

The MDOC opposed the appointment of a court-appointed expert and the Court did not follow through on obtaining an expert. Consequently, the Court must decide whether or not female gender is a BFOQ for full time corrections officers in the housing units of the female prisons in Michigan based on the evidence presented at trial. It does not go unnoticed that this decision is being made in an adversary proceeding rather than by an administrative decision on a fully informed record subject to judicial review. As will be described, the DCS did no more than rubber stamp the MDOC's request for a BFOQ. The Michigan Civil Rights Commission (MCRC), the state agency nominally assigned the task of reviewing such a request, was deliberately bypassed. This is a poor way to establish prison personnel policies and forces a judicial determination of a question that is, or should be, the result of an informed and reasoned policy determination.

II. The Statutes

A. Basic Laws

1. Federal Law

42 U.S.C. § 2000e-2(a) reads:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. State Law

M.C.L. § 37.2202 reads:

(1) An employer shall not do any of the following:

. . . .

(b) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

. . . .

B. The Exemptions

1. Federal Law

a.

42 U.S.C. § 2000e-2(e) reads:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is

> a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

b.

29 C.F.R. § 1604.2 elaborates on the exception reading in part as follows:

> (a) The [Equal Employment Opportunity Commission] believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

2. State Law

a.

M.C.L § 37.2208 provides for specific procedures to be followed for an employer to obtain BFOQ status for a particular employment position, stating:

> A person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. Upon sufficient showing the commission may grant an exemption to the appropriate section of this article. An employer may have a bona fide occupational qualification on the basis or religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

This section further states:

> . . . An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of that business.

M.C.L. § 37.2208.

The MDOC, as an agency of the State of Michigan is subject to the requirements of M.C.L. § 37.2202 and the exemption provided for in § 37.2208. *See* M.C.L. § 37.2103(g) (defining "person" to include an "agency of the state.").

b.

Initially, it was represented to the Court that DCS Regulation 3.05, Selective Certification For Position—Specific Qualifications, established the procedure to be followed by a state agency such as the MDOC in obtaining a BFOQ for a particular position. However, the Court was subsequently advised that this was not the case and that:

> the officials [in the DCS] who approved the request would have evaluated it with the standards of the Elliot-Larsen Civil Rights Act's exemption for bona fide occupational qualifications in mind.[9]

There is no evidence in the record to suggest DCS did this in evaluating MDOC's request.[10]

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[9] *See* Letter from Assistant Attorney General to the Court, dated March 29, 2002.

[10] Attached as Exhibit A is the Michigan Department of Civil Rights' application form for a BFOQ exemption.

III. Precursors To The MDOC's Effort To Make The Change

The request to DCS by the MDOC "for selective certification to allow only female staff as Corrections Officer and Resident Unit Officer positions with regular work assignments in housing units, segregation unit, [and] the intake unit [in the facilities] which house only female inmates" was made on August 20, 2000. It followed shortly after the settlements of two complex cases involving the MDOC (the court cases) brought separately by the United States (the United States case) and by a group of female inmates (the female inmates case) in 1996 and 1997. A brief summary of these cases follows. The complaints in these cases focused on operations and incidents at Florence Crane and Camp Branch.

A. The United States Case

On March 10, 1997, the United States sued the State of Michigan in this district claiming that the constitutional rights of female inmates in the female prisons in Michigan were being violated in the form of sexual misconduct by male corrections officers and that the female inmates were subject to unlawful invasions of their privacy and that their serious medical and mental health needs were not being met. *United States v. State of Michigan*, No. 97-CV-71514.

After extensive discovery and a contentious course of in-court proceedings,[11] the medical and mental health claims

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[11] The Department of Justice met with severe criticism from various state officials as its case moved forward. These officials generally claimed that the Department's charges were frivolous and represented an unwarranted intrusion by the federal government into state affairs. *See* "U.S. Alleges Sex Abuse of a Woman at 2 Prisons State Official Blasts Findings As Absurd," Detroit Free Press, Mar. 30, 1995, at 1A. For another example of the contentiousness, *see* "Human Rights Watch Challenges Michigan Subpoena To Reveal Confidential Information," available at http:// www.hrw.org/press98/oct/michig1015 .htm.

were dismissed. The remaining issues dividing the parties were resolved in the form of a Settlement Agreement dated May 25, 1999. The settlement agreement in essence provided for:

—pre-employment screening of correctional staff particularly to determine fitness to work in a female prison

—specialized training for the staff in the female prisons

—inmate orientation regarding the subject matter of the settlement agreement

—facilitation of inmates and staff reporting of allegations of sexual misconduct, sexual harassment and overfamiliarity.[12]

—timely and complete investigation of allegations of sexual misconduct

—minimization of one-on-one access to secluded areas, and the like, by male staff and female inmates

—effective response to substantiated instances of staff misconduct

—a knock-and-announce policy by male staff in areas where female inmates could be in a state of undress

—severe restrictions or pat-down searches by male staff of female inmates

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[12] Improper male staff-female inmate interaction is generally divided into three categories of descending seriousness: (1) sexual misconduct being the most severe and usually criminal; (2) sexual harassment which is typically handled administratively; and (3) over-familiarization, which may subject the offending correction's officer to a letter of reprimand. Improper conduct by staff in a female prison is not confined to CO's and RUO's in the housing units. It is found among all male staff members and there appears to be no firm evidence that it is principally found among the CO's and RUO's in the housing units.

—Department of Justice monitoring of the settlement agreement to assure compliance and eventually dismissal of the case

Nothing in the settlement agreement called for gender specific assignment of CO's and RUO's in the housing units in the female prisons.[13] The settlement agreement recognized that changes in policy which implicated bargaining unit employees were subject to negotiation with the labor unions representing such employees as well as the Office of State Employees and the Civil Service Commission and subject to state law.

The changes in policies and procedures, relating to improper male staff-female inmate interaction, screening of applicants, training and education, physical facilities and reporting required by the settlement agreement have been implemented. The changes are numerous and far reaching and the consequences attendant upon these changes are yet to be fully realized.

B. The Female Inmates Case

On March 27, 1996, a group of female inmates brought suit in this district against the MDOC and a number of state officials and corrections officers claiming sexual misconduct and sexual harassment in the female prisons. *Nunn v. Michigan Department of Corrections*, No. 96-CV-71416. Particularly, the plaintiffs claimed violations of the Fourth, Ninth and Fourteenth Amendments under 42 U.S.C. § 1983 and asked for damages and injunctive relief. Again, after extensive discovery and a contentious course, the case was

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[13] Human Rights Watch, which monitored the case, *see* n. 10, *supra*, in a letter dated June 11, 1999, complained to Attorney General Janet Reno that the settlement proposed in the case was inadequate. It did not, however, suggest gender specific assignment. *See* "Letter to Attorney General Janet Reno," available at http://wwvv.hrw.org/press/1999/jun1reno-ltr 611.htm.

settled, this time in two parts. First, plaintiffs' monetary claims were settled for $3,787,000.00 with $2,390,700.00 being distributed among 31 named female inmates. Second, on July 31, 2000, the claim for injunctive relief was settled substantially along the lines of the settlement agreement in the United States case.

Significantly, however, the settlement agreement in the female inmates' case regarding injunctive relief included the following statement:

> Consistent with the MDOC's announced intention to limit the assignment of staff in facility housing units to female officers, the MDOC will make a good faith effort to accomplish this objective during the monitoring period. If such efforts are still ongoing at the end of the monitoring period, monitoring will be extended as to this issue only for not more than two additional six month periods.[14]

IV. Request For The BFOQ

A. Gender Specific Assignment Committee

Sometime in 1998, the Director of the MDOC appointed a

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[14] The 2000 Annual Report of the MDOC available at http://www.Michigan.gov/documents/2000annualreport—2420—7.pdf, describes in some detail the settlement agreements, stating in part:

> Both lawsuits have resulted in a number of major changes in the way female prisoners and staff interact both in prisons and corrections centers. They resulted in revisions to policies dealing with sexual harassment and misconduct, including combining several of these policies; screening of staff through LEN and other checks; a requirement for male officers to "knock and announce" their presence in any areas where inmates could be in a state of undress; a committee to review retaliation charges against staff; uniforms for female prisoners (as well as for all prisoners); and exploration of the feasibility of excluding males from working in female housing units. 2000 Annual Report of the MDOC at p. 71-72.

Gender Specific Assignment Committee (GSAC)[15] consisting of a number of high level MDOC officials, including the Special Administrator for Female Offenders Programs, with the following Mission:

> *Mission:*
>
> The Gender Specific Assignments Committee (GSAC) is charged with (1) reviewing assignments within correctional facilities for the feasibility of making them gender specific, (2) evaluating the positive and negative impacts such assignments would have on the work force, and (3) providing recommendations to Director McGinnis.

The Committee's Statement of the Problem read:

> *Statement of the Problem:*
>
> The issues surrounding privacy and gender specific versus cross-gender supervision have been litigated in state and federal courts since the 1970's. The common legal bases for challenging cross-gender supervision are:
>
> First Amendment—violation of religious tenets
>
> Fourth Amendment—unreasonable search and seizure
>
> Eighth Amendment—cruel and unusual punishment
>
> Fourteenth Amendment—Equal Protection clause. Numerous cases have pitted inmates' right to privacy against the right of female and male correctional officers to equal employment opportunity. Unfortunately, this issue does not yet have a definitive answer since the courts have reached differing conclusions.

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[15] A 1990 Policy Directive of the MDOC, P.D. 02.06.100, stated the MDOC's Equal Employment Opportunity Affirmative Action Policy in conventional terms and included a standard BFOQ definition as well as a prohibition on discrimination because of "race [etc.] sex [etc.] except where the Michigan Department of Civil Rights has granted a Bona Fide Occupational Qualification (BFOQ)."

> The questions central to any discussion of gender specific assignments are: (1) Under what circumstances is it appropriate for staff of one sex to observe inmates of the opposite sex in some state of undress, and (2) can inmate privacy interests be strong enough to preclude staff of the opposite sex from holding certain posts in a correctional facility? The Committee has identified the following concerns as a context in which to examine these questions:
>
> (1) Security of the institution and safety of staff and inmates
>
> (2) Equal Employment/Affirmative Action for staff while complying with labor laws and bargaining agreements
>
> (3) Customs (mores) surrounding states of undress
>
> (4) Inmates' past trauma history regarding members of the opposite sex
>
> (5) Support/opposition from the external environment (e.g., labor and human rights organizations and the general public).

While the Mission Statement appears to suggest a study of both male and female prison staffing, its real concern was directed to the staffing of the female prisons.

The GSAC published an interim report on September 15, 1998 and a final report on December 11, 1998.

The GSAC, in its final report, made a number of recommendations regarding various *tasks* and the need to have staff assignments to these tasks on a gender specific basis. The GSAC did not, however, recommend female gender specific assignment of CO's and RUO's in the housing units in the

female prisons. It did discuss the staffing of the housing units under a subheading, *3rd Shift Housing*, as follows:

> The Committee was unable to agree. Four of six recommend MDOC more toward gender balance through attrition. The prevailing opinion among wardens is to have gender balance when possible, but not to make it a requirement. This would accommodate one person assignments and those which may decrease to one officer when a medical emergency occurs.
>
> One Committee member recommends gender specific assignments in female facilities; another recommends gender specific assignments in both male and female facilities. The dissenting four do not believe gender specific assignments are a viable option presently due to the labor pool and union contracts; however, some states have voluntarily implemented gender specific assignments on specific shifts through letters of agreement with the corrections officers' union or have responded to various threats/instances of court intervention.

In sum, the GSAC did not recommend a female BFOQ for CO and RUO's in the housing units on the first shift (6AM to 2PM) or the second shift (2PM to 10PM) and voted 4-2 against having female only CO and RUO's in the housing units on the third shift (10PM to 6AM).

B. Director's Initiative

Bill Martin (Martin) was appointed director of the MDOC sometime in early 1999.[16] On June 25, 1999, he issued a Director's Office Memorandum, 2000-33, stating the policy changes required to implement the settlement agreement in

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[16] Martin's testimony is discussed further in Part VI. C., *infra*.

the United States case. Two of these policy changes are particularly relevant to the issue here:

> *Knock and Announce—Women's Institutions Only*
>
> L.L. Absent compelling circumstances or reasonable suspicion of unauthorized activity/rule violations, male staff assigned to ACF, CDW, and SCF shall verbally announce their presence prior to entering an area where prisoners could be in a state of undress.
>
> *Pat Down and Clothed Body Searches—Women's Institutions Only*
>
> M.M. Pursuant to Policy Variance # 2239 effective through February 1, 2000 for P.D. 04.04.110 "Search and Arrest of Prisoners, Employees and Visitors" and absent exigent circumstances or a reasonable suspicion that a prisoner is in possession of contraband, pat down and clothed body searches of female prisoners shall be conducted only by female staff.

Pat down searches of female inmates by male corrections officers is a particularly contentious issue in the administration of female prisons.[17]

Although under the policy directive, the suspension of pat down searches in female prisons in Michigan is only temporary, the suspension is still in effect. There was no good explanation offered by the MDOC for why, except in

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[17] *See Jordan v. Gardner*, 986 F.2d 1521 (9th Cir.1993) (Policy requiring male prison guards to conduct random, non-emergency, suspicion less clothed body searches of female inmates is cruel and unusual punishment in violation of the Eighth Amendment). *See also* Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 Geo. Mason U.Civ.Rts.L.J. 291 (Summer 2000); David J. Stollman, *Jordan v. Garner: Female Prisoners' Right To Be Free From Random, Cross-Gender Clothed Body Searches*, 62 Fordham L.Rev. 1877 (1994); and Mushlin, *Rights of Prisoners*, 2d Ed. § 8.11—Use of Opposite Sex Corrections Personnel in Prison Searches.

extraordinary circumstances, should pat down searches need ever be done by male corrections officers. However, this raises an issue of *task* specific assignments, not whether the MDOC is entitled to a BFOQ so as to preclude male corrections officers from working at all in female prisons.

On October 13, 1999, Martin issued another Director's Office Memorandum, 2000-33A, further implementing policies required by the settlement agreements in the court cases, including:

> T. *Knock and Announce Policy*. Absent exigent circumstances or reasonable suspicion of unauthorized activity/rule violations, male corrections officers shall verbally announce their presence before entering areas where prisoners normally could be a state of undress. Wardens and supervisory staff will prepare written guidelines for staff identifying the areas where this policy shall apply and describing the manner in which the announcement is to be given. In order to prevent reporting of conduct that is permissible under this policy, the guidelines shall be posted temporarily and a copy maintained in the prison library. This policy will be a subject of on-the-job training for corrections officers by supervisory staff.
>
> U. *Pat down Searches*. Should the Department decide to resume the routine search of prisoners by male officers, supervisory staff will routinely observe line staff conducting pat down searches and give instructions or guidance as needed.

On December 9, 1999, Martin formally announced his intention to remove "male officers" from the female prisons.[18] The announcement stated:[19]

> *Director decides to make staffing changes at women's prisons*
>
> Director Bill Martin has determined that staffing for female facilities will require changes.
>
> The decision was made after consultation with the Office of the Attorney General on the legal aspects of the choice.

In announcing his decision, Martin said:

> "In recent weeks, I have gone to Crane, Scott and Camp Branch and met with employees there to inform them I was considering this move. Many of the male officers I spoke with complained that a mere allegation of sexual contact by a female prisoner has significant impact on both their family and professional career, even if the allegation is subsequently determined to be unfounded. I have been listening carefully to what our officers have been saying. I am convinced that the single best way to protect these officers' professional and personal lives is to remove them from those assignments in which they are most vulnerable. I told the officers I spoke with that the only way I could think of accomplishing this would be to remove them from that housing unit assignment."

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[18] On October 12, 1999, Martin told the Michigan House of Representatives, House Appropriations Subcommittee on Corrections, that he was considering a change to gender specific assignments in both the male and female prisons. *See* "State Examines Gender-Based Roles for Correction Officers," *The Michigan Daily*, Oct., 13, 1999, available at http:// www.pub.umich.edu/daily/1999/oct/ 10-13-99/news/news2l .html.

[19] A copy of this statement is available at http://www/state. mi/us/mdoc/FYI /12-9-99/announce.html.

> "I can appreciate the concern employees probably have after hearing of this decision. I have already begun meeting with union officials on this move, and I believe if all parties work cooperatively, we can minimize the disruption on affected employees. I hope to move as quickly as possible after the first of the year on these reassignments but at the same time be as accommodating to employees as possible. Every attempt will be made to keep employees informed of the time table for these changes as soon as it is determined."

At the time he made his announcement, Martin was unaware of the GSAC's analysis and recommendations. Nothing in any internal memoranda of the MDOC such as reports from the wardens of the female prisons, special or monthly minutes of meetings between staff and female inmates, mention the desirability or need to remove male CO and RUO's from the housing units in the female prisons. There was no evidence offered at trial of any consultation by Martin with the Michigan Department of Civil Rights or the Attorney General of Michigan regarding the change.

On December 11, 2000, Martin approved a detailed policy directive styled "Prohibited Conduct In Facilities Housing Female Prisoners," directed to the "affirmative steps to guard against sexual harassment and sexual misconduct between prisoners and staff" In the directive, responsibility for overseeing and monitoring compliance with the terms of the settlement agreements in the court cases was assigned to the Special Administrator for Female Offenders Program.[20]

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[20] The Special Administrator peculiarly was not called as a witness by any party at trial. On reflection, the Court should have insisted on hearing from the Special Administrator as the MDOC official most likely knowledgeable about conditions in the female prisons.

On May 5, 2001, the 1990 Policy Directive[21] was amended to exclude any requirement that a BFOQ request be submitted to the Michigan Department of Civil Rights.

C. The Application To The DCS

1.

Three applications to the DCS were filed on August 2, 2000 by the Personnel Director of the MDOC. Separate applications were filed for Scott, Western Wayne, and Camp Branch. At that time Florence Crane was in the process of closing down as a female prison and Camp Brighton had not yet opened. Each application described each particular CO and RUO position for which a BFOQ classification was requested. Each application stated:

> This is a request for selective certification to allow only female staff at Camp Branch, which houses only female inmates, in Corrections Officers and Resident Unit Officer positions with regular work assignments in housing units which include segregation units. Their custody and security duties include those that affect the privacy of female prisoners such as observing showers, observing inmates dressing and undressing, observing inmates using toilet facilities, and conducting multiple daily searches (including strip searches).
>
> As indicated in the attached report, a mission of the Michigan Department of Corrections is to provide a safe, secure environment, respecting the privacy of prisoners, specifically females, while providing staffing consistent with the appropriate federal and state laws regarding equal employment opportunity. The MDOC has been involved with litigation relevant to sexual misconduct between male staff and female prisoners and their privacy rights. In addition, the Department recently entered

[21] *See* n. 14, *supra*.

into a settlement agreement of the *USA v. Michigan 97-CV-71514-DT*, which alleged that inmates in Michigan women's prisons were subject to sexual misconduct, sexual harassment, overfamiliarity and invasion of privacy by staff.

The Department has made a number of changes responding to allegations of inappropriate behavior and complaints regarding privacy of female prisoners. These include physical plant modifications, policy, procedure, and employee handbook changes, improvements in staff training, staffing level increases, and improving prisoner education. However, it is felt that these changes will not eliminate inappropriate behavior or sexual misconduct.

Accordingly, we are requesting that the indicated positions be selectively certified for female staff only to occupy the positions. The following reasons are cited for this request; same sex supervision would enhance the privacy of female prisoners, reduce the likelihood of sexual misconduct, the reduction of fear of sexual misconduct will enhance the ability of the Department to achieve its mission, security capabilities would be improved due to much less reluctance by female staff to perform observation duties, and female staff only in housing units would reduce the likelihood of instances where individual male staff and individual female prisoners would be involved in long isolated contacts. The request is being made for the following position numbers:

Each application included a number of documents and particularly a Consultant/Expert Witness Report by Michael

J. Mahoney,[22] who was a witness in the court cases on behalf of the MDOC. The conclusion of Mahoney's report states:

> In spite of the comprehensive nature of the above identified activities, it is the conclusion of this Consultant/Expert Witness that female prisoner supervision by the Michigan Department of Corrections for the following limited duties and assignments should be accomplished by female staff only in order to provide the necessary safe and humane conditions of confinement and the professional operations of the MDOC female correctional facilities:
>
> - All Housing Unit RUO and CO assignments
> - Segregation Unit RUO and CO assignments
> - Intake RUO and CO assignments

Included in materials submitted with each application were expert witness reports from the court cases. These included the report of Kay Monaco, an expert witness in the female inmates case who stated in her recommendations:

> Consistent with the requirements of Title VII equal opportunity employment mandates, staff all housing units at Crane and Scott with female staff only until such a time as the incidents of sexual misconduct have been substantially reduced.

Annabelle M. Romero,[23] another expert witness in the female inmates case stated in her recommendations:

> Consistent with the requirements of Title VII equal opportunity employment mandates, male correctional officers should not be assigned to posts that include duties inside dormitories, toilet and dressing areas in the

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[22] Mahoney's testimony at trial is described in Part VI. C., *infra*.

[23] Romero testified at trial. *See* Part VI. C., *infra*.

> women's prisons. Male officers should "knock and announce" their presence when they enter one of these areas, unless they are entering the area because of exigent circumstances. If male officers continue to be assigned supervisory duties in female living quarters, a period of at least 30 minutes should be allotted during each shift when male staff are not allowed in female dormitories or restrooms. One on one inmate and staff cross gender work, recreation, housing, or transport situations should be completely eliminated.
>
> Consistent with the requirements of Title VII equal opportunity employment mandates, areas housing juveniles in adult facilities, mentally ill inmates, or inmates on detention should be staffed by female officers only. Inmates in these categories are especially vulnerable and the extent of harm possible to these inmates is severe. Thus, a greater degree of care should apply.

2.

The DCS approved the MDOC's applications 12 days later, on August 14, 2000, stating:

> Based on the Position Description (CS-214) and the information provided in your letter, the selective certification criterion approved for this position is as follows:
>
> > Allow only female staff in Corrections Officer and Resident Unit Officer positions with regular work assignments in housing units, segregation units, or the intake unit at the Scott Correctional Facility, which houses only female inmates. Their custody and security duties include those that affect the privacy of female prisoners such as observing showers, observing inmates dressing and undressing, observing inmates using toilet facilities, and conducting multiple daily searches (including strip searches).

There is no evidence to suggest any meaningful consideration by the DCS of the applications, particularly any consultation with the Michigan Department of Civil Rights or the Attorney General of Michigan. Additionally, not explained was why the DCS granted selective certification in 2001 when it rejected a prior request by the MDOC for a BFOQ for six positions in 1985, stating:

> Although we agree that all issues are not identical to those in the Griffin[24] case, we do not agree that there is adequate justification to consider this a bona fide occupational qualification. It also appears that restricting certain positions to female only would lead to claims by males that their promotional opportunities were being restricted—the exact opposite of the Griffin situation.

The conclusion to be drawn from the speed with which the applications were approved, is that the DCS rubber-stamped the MDOC's requests.

3.

Moreover, there is nothing in any publication of the MDOC to suggest that the "privacy of prisoners, especially female" as the term privacy is conventionally used, is a mission of the MDOC. Indeed, security, not privacy, is a more appropriate focus for a prison. *See Dothard v. Rawlinson*, 433 U.S. 321, 335, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) ("the essence of a correctional counselor's job is to maintain prison security"). However, Martin, in his introductory letter to MDOC's 2000 annual report, states "What we're about is serving the citizens of Michigan with a cost-effective operation, one that manages convicted felons in a safe and humane manner."

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[24] *See* n. 30, *infra*.

V. The Case In Court Pre-Trial

A summary of the salient pre-trial events follows.

The complaint was filed on July 12, 2000 with two CO and two RUO's as named plaintiffs. Defendants were the MDOC and Martin, in his official capacity and individually. A jury was demanded. Count I claimed a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Count II charged a like violation of Michigan's Elliott-Larsen Civil Rights Act, M.C.L. § 37.2202(1)(a). Count III claimed damages under 42 U.S.C. § 1983 in the form of loss of wages, promotional opportunity and other benefits. Plaintiffs requested a declaratory judgment, permanent injunction, back pay, compensatory damages, and punitive damages as relief. Defendants answer in essence denied the allegations of the complaint and asserted a BFOQ defense.

On September 5, 2000, two female inmates moved to intervene.

On September 20, 2000, plaintiffs moved for a preliminary injunction against "implementation [of the] plan to make gender-specific assignments and/or to allow any female staff to hold Correctional Officer and Resident Unit Officer positions with regular work assignments in housing units, segregation units and/or intake units at the Robert Scott, Western Wayne and Camp Branch Correctional Facilities."

At the hearing on the motion for preliminary injunction on September 22, 2000, the Court stated it would issue a preliminary injunction as requested and on September 28, 2000, entered a temporary restraining order, combining the trial on the motion for preliminary injunction with the trial on the merits and set an early trial date. A day before, on September 27, 2000, the Court approved the filing of a first amended complaint adding a third RUO as a party plaintiff.

On October 6, 2000, the Court bifurcated the claim against Martin in his individual capacity and stayed it pending resolution of the BFOQ issue, obviating the need to deal with his qualified immunity defense.

On October 13, 2000, the Court granted the female inmates the right to intervene to enable them to "participate in the defense of plaintiffs challenge to the gender-specific assignments in the housing and living areas of the Michigan women's prisons, including the right to appeal." See Memorandum And Order Granting Intervention, filed October 13, 2000 at p. 7.[25]

On December 7, 2000, the Court bifurcated the issue of damages and stayed discovery pending resolution of the issue of liability. Plaintiffs waived their right to a jury on the issue of liability only.

VI. The Trial

A. The Issue

The sole issue at trial was the right of the MDOC to limit the CO and RUO positions in the housing units in the female prisons to females. CO and RUO's are the only correctional officer positions in the housing units whose job duties require a presence throughout the entire three eight-hour shifts each day.

'While there were references on the record to intake, rover, and transportation officer positions, the selective certification sought by the MDOC from the DCS was for the CO and RUO positions. Presumably, intake, rover, and transportation officer positions are a subset of the CO and RUO positions. These positions were not discussed particularly at trial.

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[25] The female inmates are represented by the same lawyers who successfully prosecuted the female inmates court case.

A subsidiary issue at trial was whether or not the plaintiffs have made out a prima facie case of an adverse employment action as a consequence of the MDOC limiting the CO and RUO positions to females. The MDOC and the intervening defendants asserted that the plaintiffs at most have shown only inconvenience as a consequence of the change and this is not sufficient to give them standing to complain.

B. The Trial Generally

The trial extended over nine days in February and March 2001. Testimony and exhibits were largely devoted to the benefits and burdens to female prison operations of limiting full-time housing officers in a female prison to females in light of the potential for sexual assault, sexual harassment and overfamiliarization when male corrections officers have custodial responsibility in the housing units. Also covered in the testimony was the spotted record of the MDOC in operating female prisons, particularly reflected the record made in the court cases and their settlements, as well as the privacy concerns involved when male corrections officers have custodial responsibility for female inmates. Since the DCS, acting on the request of the MDOC for selective certification proceeded *ex parte*, the record of its BFOQ consideration of the materials submitted to it reflected no substantive consideration, the trial was the first occasion at which the BFOQ issue was meaningfully debated.

C. The Witnesses

1. Plaintiffs

Plaintiffs called seven witnesses. They were:

—Harley Stock, a psychologist, who testified to the ready availability of tests that can and should be used to screen prospective corrections officers to assure reduction in the number of unsuitable candidates for such positions in female prisons. Stock further testified as to

his success in using such tests and that a 1995 study upon which the MDOC relied to conclude that psychological testing did not work was flawed.

—Edda Cantor, a retired New Hampshire Department of Corrections official, who expressed the opinion based on experience that gender-restricted assignments in housing units in female prisons were unnecessary to reduce the incidence of sexual misconduct in such facilities and less restrictive alternatives are available. Cantor was of the opinion that given the changes occurring in female prisons in Michigan as a result of the settlement of the court cases, it is too early to assess the impact of the requirements and limitations required by the settlement agreements.

The measures required under the settlement agreement were, in Cantor's opinion, viable alternatives to gender-restricted assignments in the housing units.

—Bridget Gladwin, a retired New York State corrections official, who stated that correction practices in New York and nationally have established cross-gender supervision as the norm. Gladwin described her experience in rooting out staff sexual misconduct in New York prisons for females where she found that in management, few, or no rules, and little or no supervision were the cause of these events. Gladwin expressed the opinion that inmate privacy can be accommodated through the use of such items as privacy screens, shower curtains, narrowing of windows, partial doors on toilets, and a knock- and-announce policy. Gladwin described the differences in managing and operating male and female prisons, the normalizing effect of cross-gender supervision and that inmate allegations against staff are a characteristic of operating a correctional facility, male and female, which can never be eliminated.

—Charles Ewing, a professor of law and psychology, testified that excluding male correctional officers from the housing units in female prisons is not necessary to the emotional health of female inmates even those who have a history of sexual abuse. Ewing was of the opinion that the presence of male correctional officers may have a normalizing and beneficial effect on female inmates previously abused by males.

—Bethany Beauchine, an employee of the MCO, the labor union representing employees of the MDOC including CO and RUO's, identified exhibits relating to sexual misconduct data compiled by the MDOC, exhibits relating to an analysis of male and female corrections officers in the female prisons and data relating generally to MDOC operations and practices.

—Richard Idemudia an RUO, testified as to the adverse employment consequences of removing male CO and RUO's from the housing units in the female prisons, particularly with regard to "bidding" for preferred positions, the wasting of specialized experience in dealing with female inmates and the likelihood of his being demoted to a CO position if he is removed from his position at Western Wayne as well as the severe personal dislocation he will experience if transferred.

—Lori Sahl, a CO at Western Wayne, testified to the disruption in her personal life which will occur if the third shift position at Western Wayne is limited to female staff in the housing units, as well as the effect on her ability to bid for a preferred position in the short term future because of the influx of new and inexperienced female CO's should the gender-specific plan go forward.

2. Defendants

The MDOC called eight witnesses. They were:

—Patrick McManus, a corrections professional, and the monitor named in the settlement agreements in the court cases, to report on compliance with their terms. McManus testified that the MDOC is in compliance with the requirements of the settlement agreements relating to required changes in policies and procedures, particularly the training called for by the settlement agreements. McManus expressed the opinion that while he initially was of the view that it was a mistake to require females only as CO and RUO's in the housing units in the female prisons he was now of the view that female officers only should staff female prisons. Significantly, McManus testified that his final report in the female inmates case on compliance is not yet due and that he does not intend to recommend that the housing units have female CO's and RUO's only. McManus' final report in the United States case, submitted February 25, 2000, simply states that "The defendants are in substantial compliance with the provisions of the Settlement Agreement."

—George Camp, a former corrections official and currently a consultant in corrections matters, testified while he was originally of the opinion that a prison environment was normalized by cross-gender supervision, the incidents of sexual misconduct, including allegations, are too high a price to pay to continue the practice. In Camp's opinion, the knock-and-announce policy and the use of shades on the windows of cell rooms is a threat to security. Camp's survey of other prisons showed that while many states make gender-based assignments of female officers to housing units by means of maximizing staffing requirements, only four states have a BFOQ requirement. In response to questions from the Court Camp acknowledged that cross-

gender supervision in male and female prisons required additional initiatives and that it was easier to have females supervise males than males supervising females, he knew of no studies to that effect.[26]

—George Sullivan, an experienced corrections professional, testified that while the MDOC had made substantial improvement in the operation of its female prisons and while females can work in male prisons, males working in a female prison is a mistake. Sullivan was of the opinion that this was not a sound management practice and the practice should be ended to insure the safety and security of female prisons. Sullivan is of the opinion that the American Corrections Association standards, which do not call for females only in female prisons, were deficient, as is the Federal Bureau of Prisons, in having male corrections officers in its female

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[26] In particular, Camp was not knowledgeable about the General Accounting Office, December 1999 report, *Women In Prison: Issues And Challenges Confronting United States Correctional Systems* (which does not recommend female-only assignment in female prisons).

Camp was also unaware of the Correctional Service of Canada's (CSC) *Cross-Gender Monitoring Project Third And Final Report*, dated September 30, 2000, which recommends female only corrections officers in female prisons in Canada. In response to an inquiry of the Court to the Commissioner of the Correctional Service of Canada regarding any follow up or response to the recommendation, a Senior Deputy Commissioner has advised the Court as follows:

> Following release of the . . . report, CSC initiated a broad consultation process with regard to the [report's] main recommendation: to terminate cross gender staffing in Canada's women's prisons. Contrary to the findings outlined in the [report], the majority of parties consulted indicated that they were in favour of maintaining a percentage of men as frontline staff in the regional women's facilities and healing lodge.

The CSC is also awaiting a response from the Department of Justice Canada before finalizing its response.

prisons. Sullivan, in his inspection of 22 female prisons and 24 facilities for female inmates, did not find a single one which limited corrections officers in the housing units to females. Of particular (and perhaps parochial interest) was Sullivan's testimony as follows:

THE COURT: . . . you think the only salvation for corrections policy rests in federal judges?

THE WITNESS: As far as prison operations in contemporary America, I believe that because the only changes and improvements that have been made in prisons in my 46 years have been those that were handled by federal courts.

—Michael Mahoney, an expert in corrections and President of the John Howard Association For Prisoner Reform,[27] a national organization, testified as to the opinion he expressed in the June 2000 report to the MDOC described above, which formed the basis for the MDOC's request to DCS for selective certification. He testified that despite the improvements the MDOC has made to ensure the safety and humane conditions of confinement in its female prisons, assignment of CO's and RUO's in the housing units should be females only. This, Mahoney testified, would reduce the opportunity for, and fear of, sexual misconduct and diminished opportunity for overfamiliar relations and improve security. Mahoney acknowledged that the John Howard Association, one of whose purposes is to "monitor correctional facilities and programs in Illinois," has never recommended publicly and particularly to the State of Illinois that males should be excluded as corrections officers in Illinois female prisons. Mahoney was not familiar with the report of the GSAC described

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[27] *See* http:/www.johnhowardassociation.org/index.html.

above, even thought it is listed in his report as having been reviewed.

—Jack Haynes, a psychologist, testified that in his opinion psychological testing cannot predict if a particular corrections official will engage in some form of inappropriate behavior with an inmate.

—Joan Yukins, an employee of the MDOC since 1975 and Warden of Scolt since 1991, was called as a witness by the MDOC after the Court sharply observed that it appeared no official of the MDOC except its director was going to testify. Yukins was not a member of the GSAC and was not consulted by Martin before the request for selective classification was made to the DCS. Indeed, she testified that she was "flabbergasted" when she heard what Martin had said to the committee of the Michigan House of Representatives[28] regarding female only corrections officers.[29] Yukins further testified that while she was initially of the opinion that female only corrections officers in the housing units were not necessary to adequately operate a female prison and had so testified in the female inmates case, she has since changed her mind and is now of the opinion that female only corrections officers are necessary. Yukins also testified that she there has never been a discussion among senior management of the MDOC regarding cross gender supervision so far as she knew, nor has the appropriateness of female-only corrections officers in the female prisons ever been an agenda item at any of the quarterly meetings of wardens which she attended, nor had she ever discussed the matter with her staff. Yukins acknowledges that the vast majority of male CO and RUO's perform their duties in a professional man-

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[28] *See* n. 17, *supra*.

[29] *See* Trial Transcript of March 5, 2000 at p. 142.

ner. Yukins did not see the request for selective certification or any of its attachments until her depositions was taken in this case.

—Martin, director of MDOC since June 15, 1999, acknowledged he had no prior experience in corrections except as a member of the state legislature.[30] Martin became director at the time when the court cases were in their most contentious period. Martin was of the opinion that despite improvements to the MDOC policies and procedures, training and physical facilities, sexual misconduct and allegations of sexual misconduct had not ended and removal of males from the female housing unit was necessary to bring the level of misconduct as low as possible. Martin was of the opinion that improvements in privacy have come at the expense of security in the female housing units. As director, Martin said he must have flexibility in determining how to best run the female prisons. Martin testified he has never done an empirical study of privacy initiatives in the female prisons in Michigan compared to other states; never asked his staff to do a survey; and was not familiar with the state prisons in which there were BFOQ's. Martin declined to testify on whether he had ever consulted the Attorney General on the legality of his request to the DCS and there is nothing in the record to suggest that he did. Martin said that the MDOC has met all the requirements of the settlement agreements in the court cases and acknowledged that many male CO's and RUO's in the housing units in the female prisons perform their jobs without engaging in any improper conduct. Martin, in addition to the matters described in Part IV.B., *supra*,

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[30] Martin, after leaving the legislature, was appointed Commissioner of the Michigan State Lottery. On January 31, 2002, he resigned as MDOC director to become chief executive officer of the Michigan Association of Realtors. (continued)

further testified that he did not seek, to include elimination of male CO and RUO's from the female housing unit in the settlement agreements, believing the change had to be initiated by the director, including sitting down with the MCO. Martin testified he initiated the effort to change to protect both the female inmates and the male corrections officers and for no other reason. Martin acknowledged that there had not been a sustained allegation of sexual misconduct against a corrections officer in a female prison for about two years. Martin, who was only vaguely familiar with the report of the GSAC, did not review personally the request for selective certification, did not get an opinion from the Attorney General on the legality of the proposed change, was not familiar with the 1982 decision requiring the MDOC to employ female officers in the male prisons[30] and had no familiarity with the expert reports in the two court cases.[31]

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[30] (continued) In *Griffin v. Michigan Department of Corrections*, 654 F.Supp. 690 (E.D.Mich.1982), a decision which was not appealed, another judge in this district found, as described in the introductory abstract:

> [male] inmates did not possess any protected privacy right under Federal Constitution against being viewed while naked by correctional officers of opposite sex, and, thus, gender was not "bona fide occupational qualification" for correctional officers that would be in position to view inmates while naked; (2) probabilities of sexual assaults on female correctional officers and potential impact on prison discipline and rehabilitation opportunities were not of magnitude that justified making gender bona fide occupational qualification; and (3) employment and promotional policies and practices violated prohibition against discrimination on basis of gender.

[31] At the conclusion of Martin's testimony, the Court stated that based on what he said, it appeared that the MDOC, in requesting selective classification, relied solely on anecdotal evidence as well as Martin's personal inclinations. The Court further observed that from the day Martin came to MDOC he wanted to make the change and it made no difference

—Janet McCleland, a deputy director of the DCS, testified by affidavit as to the regulations relating to the request for selective certification and that the request was reviewed before being approved by the State Personnel Director and other civil service managers. (There is no evidence that this occurred.)

3. Intervening Defendants

Intervening defendants called six witnesses. They were:

—Robin McArdle, an inmate at Western Wayne who testified as to suffering childhood sexual abuse, a sexual assault(s) while an inmate at Florence Crane and in other female prisons, and the adverse effect on female inmates when males are their correctional officers.

—Brandy Nash, an inmate in various female prisons for more than three years, described the incidents of sexual assaults and sexual harassment she experienced by male correctional officers and the incidents of retaliation for reporting such conduct and the psychological trauma she suffered by being controlled and viewed by male correctional officers.

—Gladys Wilson, an inmate of various women's prisons for many years, testified as to the absence of sexual harassment, sexual assault, privacy violations and the like in the years before male correctional officers were assigned to female prisons. Wilson described the abuse she suffered prior to incarceration and how prior abuse has been magnified by being guarded by male corrections officers.

—Victoria Baldridge, a relatively recent inmate at Western Wayne, testified as to the absence of any

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to him what anybody told him. The Court was of this view in particular because Martin never requested, nor received, an opinion from the Attorney General as to whether making the change was legal.

orientation relating to sexual assaults and sexual harassment and incidents of abuse and invasion of privacy at the hands of male correctional officers.

All of the female inmates who testified expressed the opinion that male correctional officers in the housing units adversely affected their efforts to rehabilitate themselves. Their testimony replicated evidence in the female inmates case.

—Terry Kupers, a medical doctor, testified on the impact of the presence of male corrections officers in the female housing units, the vulnerability of female inmates based on their history of prior abuse and the adverse consequences of the presence of male correctional officers in female housing units with particular emphasis on younger females.

—Annabella Romero, an expert in corrections work and an expert in the United States case, described the scores of interviews she did with female prisoners and staff regarding the sexual abuses in Michigan's female prisons. Romero also described the significant number of incidents of staff sexual abuse. Romero expressed the opinion that only female correctional officers should be assigned to the housing units in female prisons.

D. The Exhibits

Approximately 250 exhibits were received in evidence at trial. They included MDOC reports and minutes of meetings, staffing reports, training and reporting materials, layouts and photographs of housing units, inmate population data, incident data relating to sexual misconduct and other sanctionable conduct by corrections officers and other personnel, the request to the DCS for selective certification and the responses, position descriptions, court cases papers, expert witness reports, the collective bargaining agreements with the MCO, affidavits, published papers, curriculum vitae of the

expert witnesses, narrative statements of direct testimony of the expert witnesses, ACA Standards and a miscellany of other papers relating to MDOC activities and management of prisons.[32]

1. Plaintiffs' Relevant Exhibits

Plaintiffs' relevant exhibits were:

— Civil Service Job Specification and the MDOC Position descriptions for CO and RUO's	(Px4-5)
— The MDOC request for selective certification	(Px7-9)
— The impact of female only CO and RUO positions in the housing units in the female prisons in Michigan	(Px10)
— Charts displaying sexual misconduct data 1994-2000 including allegations and dispositions in the female prisons	(Px11)

[32] In addition to the exhibits provided by the parties, the Court located several reports and other documents regarding the rights of female inmates. These include the following: "Not Part of My Sentence" Violations of the Human Rights of Women in Custody in the United States, by Amnesty International, dated March 1999, available at www.amnesty.org/alibi/aipub/1999/25100199.htm; Human Rights Watch "All Too Familiar: Sexual Abuse of Women in U.S. State Prisons," December 1996, available at http://www.hrw.org/summaries/s.us96d.html, and "Nowhere to Hide: Retaliation against Women in Michigan State Prisons," July 1998, available at http://www.hrw.org/reports98/women, and United Nations High Commissioner for Human Rights, "Standard Minimum Rules for the Treatment of Prisoners," available at http://www.unhchr.ch/html/menu3/b/h_comp34,htm, and "Women Offender Symposium: Through the Eyes of a Child," September 19-20, 2000, by the Minnesota Department of Corrections.

— Detailed summaries of sexual misconduct allegations and dispositions in the female prisons (1994-2000)	(Px13)
— The American Correctional Associations standards for Adult Correctional Institutions Third Edition	(Px14-15)
— Letter to Court regarding Staffing of housing units in female prisons nationally	(Px16)
— Settlement Agreement—United States Case	(Px23)
— Settlement Agreement—Female Inmates Case	(Px24)
— MDOC Director's Office Memorandum, 2000-33; 2000-33A November 11, 1999) detailing changes in policies and procedures for implementing settlement agreement in United States Case including reporting, conduct of investigation, tracking, minimization techniques, monetary, knock-and-announce policy, pat down search limitations, screening training and quality assurance	(Px25)
— MDOC Investigations materials regarding grievances in women's prisons	(Px26)
— Various MDOC materials relating to implementation of Settlement Agreements	(Px27)

— 19999-2001 Collective Bargaining Agreement Between State of Michigan and MCO	(Px28)
— Psychological testing materials	(Px3l-38)
— The Securior report, entitled "Raising the Standard"	(Px39)
— Tabular listing of experts' recommendations in United States Case and MDOC actions taken in response including changes in shower curtains, toilet areas and cell door windows, knock-and-announce, limitations on pat down searches, grievance procedures, training, appointment of a Special Administrator for Female Offender Programs	(Px46)
— Summary of 1999 and 2000 sexual misconduct reports	(Px56)
— Application for Selection Certification to MDOC	(Px57)
— DCS denial of MDOC request for selection certification (females) for six positions—1985	(Px63)
— Scott monthly reports to the Director January 1999-January 2001	(Px66)
— Scott Warden's Forum Meeting—Minutes January 1999-January 2001	(Px68)
— MDOC Memorandum from Yukins commenting Securior recommendations	(Px69)

— EEO Affirmative Action Policy Directives, P.D. 02.06.100-12-17-90 and EEO Policy Directive P.D. 02-06-00-05-01-00 (Px70)

2. Defendants' Relevant Exhibits

Defendants' relevant exhibits were:

— McManus' final report on monitoring the MDOC Compliance with Settlement Agreement in United States Case (DxB-2)

— Order of Dismissal in female inmates case of August 17, 2000 ("The dismissal is conditioned upon Defendant's substantial compliance with The terms of the settlement agreement." (DxC-2)

— Female Offender 1999/2000 Staff Training Program (DxE-2)

— MDOC Policy Directive, 003.03.140—Prohibited Conduct In Facilities

Housing Female Prisoners—12/11/00 (DxF-l)

— Listing of measures taken to prevent sexual misconduct in female prisons (These include knock-and-announce policy, one-on-one contact restrictions, limitation on searches, grievance procedure, sexual misconduct, tracking data, training and physical plant changes (DxG)

— Summaries of investigations relating to sexual misconduct at the female prisons	(DxI-1 to DxI-9)
— Statistics relating to female prison population and statistics relating to corrections officers and the like gender-race-ethnicity	(DxM-1 to DxM-15)
— DCS approval for selection certification	(DxU-2 to DxU-3)
— Brochure entitled "Appropriate and Inappropriate Staff and Prisoner Interactions: A Guide to Sexual Misconduct Prevention and Intervention, November 1996, updated September 2000."	(DxX-l)
— Prisoner Education Instructor Guide of May 2000	(Dx-X-2)

3. Joint Exhibits

Joint exhibits were:

— Staffing Summaries for Female Facilities (June 2001)	(Jxl)
— Staffing Summaries for Camp Brighton (March 2002)	(Jx2)

VII. Statistics

Because much was made at trial of the statistics regarding sexual misconduct involving female inmates, a separate discussion is in order.

There were a host of exhibits in evidence relating to statistics. The conclusion to be drawn from them is not easy. First, to properly understand what the statistics reflect the year in which an incident occurred must be differentiated

from the year in which the allegation was made and the year in which a finding was memorialized. Also, incidents involving the CO's and the RUO's in the housing units in the female prisons must be differentiated from incidents involving other male staff in the female prisons such as, for example, maintenance mechanics, storekeepers, instructors, yard officers, and kitchen workers. Lastly, incidents of sexual misconduct, incidents of sexual harassment and incidents of overfamiliarization must be differentiated because of their descending order of seriousness and what they display regarding improper conduct.

The MDOC keeps detailed statistics which display individual incidents of improper conduct in each of the female prisons year-by-year, as well as the results of the investigation of such an incident, i.e. sustained, not sustained, unfounded, other, and pending. None of the parties, however, in their proposed findings attempted to draw any conclusions from the statistics as to how pervasive is the problem of improper conduct in the housing units in the female prisons. The statistics overall show that with the closing of Florence Crane and the implementation of the requirement of the settlement agreements, the allegations of improper conduct have gone down as follows:

Year	Allegations	Finding Sustained
1998	57	22
1999	40	3
2000	25	0

The MDOC and the intervening defendants in an effort to counteract the picture displayed by the substantial drop in allegations of improper conduct average them over the period 1994 to date of trial and then translate them into percentages. Included are incidents at Florence Crane without regard to the fact that it was Florence Crane that was the target in the court cases.

The MDOC takes the position that no level of sexual misconduct is acceptable in the operation of a prison and that allegations of sexual misconduct, meritorious or not, are statistically significant and justify the BFOQ requirement. As will be discussed, however, something more is required for defendants to make their case.

VIII. The Right Of Plaintiffs To Bring Suit

A.

Strangely, defendants contest the right of plaintiffs to challenge the BFOQ initiative on the grounds that it would not have an adverse employment affect on any of them. This challenge ignores the pending motion for class certification and particularly defendants response to the motion which states in part:

> There is no need for a class action because the injunctive and declaratory relief sought by Plaintiffs would apply to all those similarly situated. Therefore, Plaintiffs' request for class certification should be denied because there is no reason for a class.

Presumably, as far as the MDOC is concerned, the dislocation of CO and RUO's, male and female, occasioned by the DCS approval of the BFOQ request is *de minimus* and, therefore, no CO or RUO has standing to challenge it.

The law is well settled that "a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). What is required is a "'materially adverse' change in the terms or conditions of employment because of the employer's action," *Nguyen v. City of Cleveland*, 229 F.3d 559, 562 (6th Cir.2000).

B.

Here, as previously described, the impact on the female prisons is significant. Sixty percent (60%) of the positions in the housing units in the female prisons in Michigan would be limited to females and between 70 and 75 male CO and RUO's and 147 female CO and RUO's would be removed from their assignments and as many as 23 male CO and RUO's would be transferred to a different prison. Some of these officers would lose the job opportunity to bid for different positions and may also suffer promotional opportunities. Plaintiffs Idemudia and Sahl described in some detail, see Part VI. C., *supra*, the dislocation in their work and personal lives they would suffer if the CO's and RUO's positions in their work places were made female only in the housing units in which they work. This is certainly enough of a basis to allow them to file suit, notwithstanding the fact that MDOC effectively concedes that others in like positions would also suffer from the same disadvantages and dislocations.

C.

The cases cited by the MDOC are not to the contrary and the effort to urge the Court to follow them as precedent tends to trivialize the effort the MDOC is making to justify the BFOQ. In *Bowman v. Shawnee State University*, 220 F.3d 456 (6th Cir.2000), plaintiff was removed from his position for 10 days with no loss of monies. In *Hollins v. Atlantic Co.*, Inc. 188 F.3d 652 (6th Cir.1999), plaintiff complained of lower evaluations, which nonetheless resulted in merit raises. In *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir.1996), an admonition without a change in pay, benefits, duties, or prestige was involved. Finally, in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir.1987), the issue was a requested transfer with the same salary and benefits.

Confining the CO and RUO's positions in the housing units in the female prisons in Michigan is a sea change in

MDOC personnel policies. Plaintiffs have every right to make the challenge.

IX. The BFOQ

A. The Law Generally

No useful purpose will be served by a general discussion of the law of sex discrimination applicable to the issue here or the conditions required to establish a BFOQ generally. Suffice to say, that to maintain a BFOQ requirement for a position, an employer must establish by a preponderance of the evidence three essential facts. First, the employer must establish that there is a basis for the belief that all or substantially all males will be unable to perform safely and efficiently the job. *See International Union, United Auto., Aerospace, and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 207, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991), (". . . Johnson Controls has shown no 'factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'"); *Dothard v. Rawlinson*,[33] 433 U.S. 321, 333, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) ("it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotypical characteristics of the sexes. . . .").

Second, the job qualifications which males are unable to perform relate to the essence or central purpose of operating the business at hand. *See International Union*, 499 U.S. at 203, 111 S.Ct. 1196 ("[In *Dothard*] we stressed that in order to qualify as a BFOQ, a job qualification must relate to the 'essence' . . . or to the 'central mission of the employer's business.'").

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[33] *Dothard* effectively held security considerations validated a prohibition on female corrections officers working in a male prison. As described in *Griffin v. Michigan, supra*, "[i]n *Dothard*, the Supreme Court was considering a brutal, jungle-like, maximum security environment in Alabama."

Third, the employer must establish that there is no reasonable alternative to employing females exclusively in the position for which the BFOQ is sought. *See International Union*, 499 U.S. at 193, 111 S.Ct. 1196.

B. The Law Particularly

1. Female Prison BFOQ

Plaintiffs cite five cases dealing specifically with the female BFOQ in a female prison. While the five cases do not cover the universe of cases in which a female BFOQ for a corrections officer in a female prison was the issue, a discussion of each of these cases is sufficient to reflect the fact/law combination underlying the decision here.

Forts v. Ward, 621 F.2d 1210 (2d Cir.1980), involved a challenge by female inmates to the assignment of male corrections officers to duties in the housing and hospital units of the facility in which they were housed. The district court granted a preliminary injunction on the grounds the plaintiffs were likely to prevail on the merits since such assignment violated the inmates' constitutional right of privacy without serving any legitimate and compelling state interest and the assignments were not required by the Civil Rights Act of 1964. On appeal, the Court of Appeals for the Second Circuit reversed the grant of the preliminary injunction and remanded the case for an evidentiary hearing on the grounds disputed issues of fact were present. *See Forts v. Ward*, 566 F.2d 849 (2nd Cir.1977).

On remand, following an evidentiary hearing, the district court adhered to its initial decision and required the State of New York to provide either assignment schedules or physical changes, "while maximizing equal job opportunity, will afford each inmate the minimal privacy which the Court concludes she is entitled." *Forts v. Ward*, 471 F.Supp. 1095, 1102 (S.D.N.Y.1978). The district court was particularly concerned with male officers having an opportunity to see

female inmates using the toilet and showering, as well as observing the females in other circumstances which their privacy rights were being violated, particularly on the night shift.

On a second appeal, the Second Circuit again vacated and remanded the district court's decision, and spelled out in some detail just what was necessary to "satisfactorily accommodate" the "competing interests" before deciding whether "one interest must be vindicated to the detriment of the other." *Forts*, 621 F.2d at 1212. The court of appeals decision makes no mention of security interests or of elimination of improper conduct as the basis for limiting male corrections officers' right to work in a female prison.

In *Edwards v. Department of Corrections*, 615 F.Supp. 804 (M.D.Ala.1985), the district court rejected a claim that a female BFOQ was of the essence of the job of shift commander in a female prison noting particularly that "the [prison officials] failed to prove that the nature of the prison's operation precludes rearranging job responsibilities in a way that would eliminate the clash between the privacy interests of female inmates and the employment opportunities of male officers as shift commanders." *Edwards*, 615 F.Supp. at 809. Again, neither security interests or elimination of untoward conduct was an issue.

In *Torres v. Wisconsin Depart. of Health and Social Servs.*, 859 F.2d 1523 (7th Cir.1988) (en banc), male prison guards challenged a female BFOQ for the position of guard in a female correctional institution. The district court sustained the challenge, finding that the state failed to satisfy the requirement for a BFOQ and did not attempt to utilize administrative alternatives to accomplish their goal without violating the national policy against sex discrimination and failed to justify the plan based on security, rehabilitation or privacy reasons. The Court of Appeals for the Seventh Circuit initially, in a 2-1 decision, affirmed the district court. *Torres v. Wisconsin*

Dept. of Health and Social Servs., 838 F .2d 944 (7th Cir. 1988). On rehearing, in an 8-3 decision, the Court of Appeals reversed the district court on the grounds the prison officials were held to a too strict standard of proof, *i.e.* objective evidence either from empirical studies or otherwise, displaying validity of their theory that rehabilitation of inmates in a female maximum security facility would be enhanced by employing only female correctional officers in certain positions. In remanding for further consideration, the Seventh Circuit said:

> We believe . . . the defendants were . . . Given the nature of their "business"—administering a prison for female felons—the defendants, of necessity, had to innovate. Therefore, their efforts ought to be evaluated on the basis of the totality of the circumstances as contained in the entire record. In the Title VII context, the decision of penal administrators need not be given as much deference as accorded their decisions in constitutional cases.
>
> * * * *
>
> *However, their judgments still are entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience.* The fact that the program is considered a reasonable approach by other professional penologists also is a factor to be given significant consideration. In an area where the questions are so many and the answers so few, the range of reasonable options must necessarily be more extensive. Certainly, the court ought not require unanimity of opinion and ought not to substitute completely its own judgment for that of the administration.

Torres, 859 F.2d at 1532 (emphasis added, internal citations and footnote omitted).

In *Torres*, the sole basis for requiring further consideration by the district court was the rehabilitation justification;

privacy and security consideration did not offer a justification for the BFOQ:

* * * *

> . . ., we emphasize that it would be a mistake to read our decision today as a signal that we are willing to allow employers to elude Title VII's requirements simply by arguing that they were "innovating." Rare is the employment situation in which an employer could argue that gender-based distinctions are a "reasonably necessary" approach to innovation in one's business. We hold only that, given the very special responsibilities of these defendants and the obvious lack of guideposts for them to follow, it was error to require that they adopt only a course that was subject to objective validation.

Id. at 1533.

In *Multnomah County Corrections Officers Assn v. Multnomah County*, 1989 WL 51003, 1989 U.S.Dist. LEXIS 5086 (D.Or.1989), male corrections officers challenged a policy of prohibiting them from working in female inmate housing modules. The district court denied defendants' motion for summary judgment on the grounds there were genuine issues over material facts which required resolution by trial. While the district court acknowledged that some deference must be paid to the administrator's decision, importantly it noted, "It is necessary to determine whether such judgments are supported by the available evidence or whether they are based on stereotypical assumptions." *Multnomah*, 1989 WL 51003, *3, 1989 U.S. Dist. LEXIS at *9.

In *Robino v. Iranon*, 145 F.3d 1109 (9th Cir.1998), male correctional officers challenged a policy of assigning only female correctional officers to six posts in a Hawaii prison housing female inmates, each of which included a "First Watch" position. The Court of Appeals for the Ninth Circuit turned back the challenge. The district court found that fe-

male gender was a BFOQ reasonably necessary to "accommodate the privacy interest of the female inmates and reduce the risk of sexual conduct between [the male officers] and [the female] inmates." *Id.* at 1110. The Ninth Circuit, in affirming, stated:

> After a study conducted by a specially appointed task force in compliance with an EEOC settlement agreement, prison officials authorized by the Department of Personnel Services determined that the best policy to protect female inmates and to prevent allegations of sexual misconduct was to designate six posts as female-only. This professional judgment is entitled to deference.
>
> * * * *
>
> The policy limits eligibility for such a small number of positions (six out of forty-one) that it imposes such a de minimus restriction on the male ACO's employment opportunities that it is unnecessary to decide whether gender is a BFOQ for the few positions affected. . . . In such circumstances, "[t]he conflict between the right of one sex not to be discriminated against in job opportunities and the other to maintain some level of privacy has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards.". . . The male ACO's have not suffered any tangible job detriment beyond a reduced ability to select their preferred watches.
>
> * * * *
>
> Assuming arguendo that plaintiffs raise a colorable Title VII claim, however, we conclude that gender constitutes a BFOQ for the six posts at issue here. . . .
>
> * * * *
>
> The record amply supports the claimed BFOQ. WCCC adopted its current policy of assigning only female ACO's to posts that raise inmate privacy or safety

> concerns based on the serious allegations and the ensuing problems with morale among both the inmates and the ACO's. *To comply with an EEOC settlement, it conducted an extensive survey of post duties before determining which posts should be designated female-only.* Each designated female-only post is residential and requires the ACO on duty to observe the inmates in the showers and toilet areas for the prison's own security or provides unsupervised access to the inmates. The state's legitimate penological interests outweigh whatever interest the male ACO's may have in standing the watches of their choice. Viewing the evidence in the light most favorable to the plaintiffs, the defendants have met their burden of demonstrating that their policy is reasonably necessary to the operation of the WCCC. The defendants have established these six female-only posts are a reasonable response to the concerns about inmate privacy and allegations of abuse by male ACO's.

Id. at 1110-1111 (citations omitted) (emphasis added).

What is important to the decisions in *Torres* and in *Iranon* is that the prison officials, before making the change, conducted extensive studies of the prison environment and came to reasoned conclusions that for particular penalogical reasons the female BFOQ was appropriate. In *Torres*, the district court was directed to reconsider its ruling based on the totality of circumstances presented in justification and in *Robino* only a limited number of positions were involved and the dislocation complained of was *de minimus*.

2. No Reasonable Alternatives

In addition to establishing that the BFOQ is necessary to the safe and efficient operation of the female prisons, the MDOC must also establish that there are no reasonable alternatives available to excluding male CO and RUO's from the female housing units. *See Reed v. County of Casey*, 184

F.3d 597, 599 (6th Cir.1999) ("Defendant . . . has the burden of establishing that no reasonable alternatives existed" to meet state requirements against male deputy jailers supervising female prisoners alone);[34] *Hardin v. Stynchcomb*, 691 F.2d 1364, 1374 (11th Cir.1982) ("Defendants . . . have failed to prove they cannot rearrange job responsibilities so that female deputies assigned to male sections of the jail will not have to perform duties that impinge upon inmate privacy rights."); *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir.1980) ("We. . . conclude that . . . the remedy proposed by the State will accord adequate protection to the privacy interests of the inmates by means that will avoid any denial of the guards' right to equal employment opportunities."); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir. 1980) ("In addition to showing that the hiring of women at Anamosa would undermine the essence of the prison administration, Anamosa must also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates, and the nondiscrimination principle of Title VII.").

3. Female Inmates Rights

Female inmates retain the right to be protected against unwarranted intrusion by male corrections officers and denying the BFOQ request does not give right to the MDOC to give co-extensive job responsibilities to male and female CO and RUO's. *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982). For example, male CO and RUO's cannot strip search female inmates, *Cornwell v. Dahlberg*, 963 F.2d 912, 915-16 (6th Cir.1992) (strip search of male inmates before female corrections officers raises a valid privacy claim under Fourth

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[34] In *Reed*, the Sixth Circuit upheld a BFOQ for a female jailer on the third shift in a county jail housing female prisoners as a consequence of a state regulation that a female jailer be present whenever a female inmate was lodged in a jail. The alternative was to transfer female prisoners to neighboring jails.

Amendment). *See also Hardin v. Stynchcomb*, 691 F.2d 1364, 1373 (11th Cir.1982) ("while it is important to maintain order and security within [a] jail . . . inmates' retained privacy rights may be unnecessarily invaded by deputies [housing corrections officers] of the opposite sex conducting strip or body cavity searches, or oversee use of toilet and shower facilities.").

X. Findings

A. Facts

Based on the testimony at trial, the exhibits received in evidence, and the inferences to be drawn from them, seven overall factual findings, some of which have been described in detail above, are determinative of the Court's conclusion that MDOC and the intervening defendants have not made out a case for a female-only BFOQ in the housing unit of the female prisons.

First, standard practices nationwide provide for the employment of male corrections officers in female prisons. Admittedly there are limitations on the scope of the *tasks* male corrections officers can perform and additional physical structure over-and-above that generally called for in a housing unit is necessary. However, there is nothing unique about the operation of the female prisons in Michigan which suggests that the BFOQ is necessary for the MDOC to perform its mission or the essence of the business of running a female prison requires a BFOQ. Moreover, the standards set by the ACA do not exclude male corrections officers from the housing units in female prisons.

Second, internal studies by the MDOC do not support the elimination of male CO's and RUO's from the housing units in the female prisons. The GSAC's recommendation have already been discussed. A second study commissioned by the MDOC following the settlement of the United States case, *Report On Staffing Feasibility Study of Scott and Florence*

Crane Correctional Facilities by Charles J. Kehoes and Nelda C. Leon, for Securior New Century, LLC, dated August 20, 1999 (referred *supra* as "the Securior report"), while recommending strategies to increase the number of female corrections officers in the housing units did not recommend a female BFOQ for the CO's and RUO's in the housing units. There is no evidence that the MDOC has attempted to implement the Securior recommendations. Additionally, as previously stated, aside from Martin's views on the desirability of the female BFOQ requirement, there is no evidence that any MDOC official supported it at the time the request was made to DCS for selective certification.

Third, the concern over cross-gender supervision leading to the application for a BFOQ began with Martin when in 1988, as a member of the state legislature, he participated in a hearing regarding the murders of a male corrections officer and a female corrections officer, both in male prisons. Martin, on becoming director of the MDOC, began looking into eliminating cross-gender supervision and while he initially hoped to achieve this in both the male and female prisons he very early decided to focus only on the female prisons.

Fourth, the expert opinions offered by plaintiffs are considerably more credible and should be given greater weight than those offered by MDOC. The plaintiffs' experts have had hands-on experience in the operations of female prisons. The defendants' experts have had no direct experience in the operations of female prisons. The experts' testimony proffered by the female inmates replicates what they said in the female inmates court case and there they did not opine that a female BFOQ for housing unit corrections officer was necessary to deal with the abuses they found existed.

Also, the MDOC experts were not familiar by-and-large with the internal MDOC study and not familiar with other studies which have dealt with the problem associated with abuses in female prisons occasioned by lax control of male

corrections officers and particularly poor correctional practice such as pat-down searches by them. Why the MDOC preferred to rely on expert testimony rather than the opinion of its senior officials and particularly those dealing with the operation of the female prisons in Michigan, was not explained. While Yukins is undeniably a respected professional in the corrections field, the radical change in her position diminishes the weight to be given her opinion.

Fifth, the ameliorative requirements of the changes called for by the settlement agreements in the court cases have only recently been implemented. Changes in physical structures, reporting requirements, staff interactions and the like have created a whole new environment in the female prisons. The court-appointed monitoring has only recently been concluded.[35] The monitor testified he did not intend to recommend a female BFOQ for the CO's and RUO's. The move to take the male CO's and RUO's out of the housing units in the female prisons was initiated shortly after the settlement agreements were signed. No effort has been made to assess the changes required by the settlement agreement.

Sixth, although the statistical evidence relating to improper interaction has already been discussed it bears repeating that the statistics show a substantial decrease in improper conduct since the implementation of the changes called for by the settlement agreements.

Finally, the published literature on the- presence of male correctional officers in female prisons does not support a female BFOQ for corrections officer in the housing units in a female prison. Much of this literature is listed in an attach-

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[35] To date, the monitor has not issued a final report. Apparently, a visitation to the female prisons is scheduled for August and a final report is expected in September of this year.

ment to the Memorandum of March 23, 2001 filed at the conclusion of the trial. As stated in the Memorandum:

> Studies in the literature, listed in Exhibit B, do not support the need for wholesale change or complete exclusion of male correctional officers from female housing units. In fact, some of the studies suggest the contrary: that it is desirable to have mixed gender correctional officers in the housing units and that female prisoners view this favorably.

See Memorandum of March 23, 2001 at p. 9.

B. Reasonable Altematives

There is really no need to discuss reasonable alternatives. There has simply been no showing that there is reasonable cause to find that all, or substantially all, males are not able to perform safely and efficiently the duties of a CO and RUO in the housing units in the female prisons. Very few male CO or RUO's are likely to be involved in improper activities. The few that are likely to be involved does not justify a BFOQ requirement in the face of federal and state law clearly prohibiting gender based discrimination.

However, even considering reasonable alternatives, which are better expressed as additional requirements, the Securior study identified the following reasonable alternatives to employing female CO and RUO's exclusively:

—covering vacancies with females

—increasing female coverage where necessary with overtime

—redeployment of female officers in supervisory positions

The MDOC has never explored these recommendations. Once Martin made his decision there appears to have been no effort to change existing staffing patterns in the housing units.

The policy that each CO and RUO conducting five pat-down searches per shift appears to be still in place. Elimination of the requirement would lessen the tensions which must inevitably result from the male staff-female inmate interaction occasioned by this requirement.

Moreover, no effort has been made to enhance pre-employment screening of new CO's and RUO's to lessen the likelihood of employing high risk male CO's and RUO's in the female prisons. Such testing has been used in other prison systems in the United States.

In sum, the MDOC has done nothing aside from implementing the requirements of the settlement agreements to enhance the conditions under which the male CO's and RUO's in the housing units relate to the female inmates under their charge.

C. Continued Incidents

That there may be continued allegations of improper interaction, as well as incidents, does not support a BFOQ requirement. The statistical evidence shows that the changes required by the settlement agreements have lessened the number of such allegations and incidents. Particularly, the incidents of sexual misconduct have been reduced to almost zero and the most recent reported allegation did not involve a CO or RUO. Additionally, the changes in policies and procedures are of recent origin such as screening of job applications, staff training and prisoner education and facilitation of reporting of improper interactions. Physical modifications are also of recent origin. It is simply too early to gauge the full impact of these changes.

XI. The Intervening Female Inmates' Case

As a consequence of the independent status of the female inmates as intervening parties defendant a brief discussion of

their arguments in support of the BFOQ requirement and why they do not carry the day for them is in order.[36]

A. "The Harm To Plaintiffs Is Speculative And, At Most Minimal"

This assertion has already been discussed and the Court has explained why plaintiffs have standing to challenge selective certification. As previously described, some 270 CO's and RUO's would be adversely effected by approval of the BFOQ. If the female inmates' view of the minimal dislocation occasioned by limiting CO's and RUO's to female corrections officers only in the housing unit is correct; there appears to be no impediment to the MDOC making the change without the certification requested of the DSC. Obviously this is not the position of the MDOC. Additionally, in negotiations during the settlement agreement in the female inmates case the opportunity was present to negotiate for housing unit corrections officer qualifications much in the way that changes in practice and procedures were negotiated and this was not done. Effectively, the female inmates are trying to obtain in this case what they failed to obtain in the female inmates case.

B. "Since Plaintiffs Do Not Contest Right Of MDOC To Make Gender Specific Tasking Assignments MDOC Is Entitled To Make The Tasks Of CO And RUO's In The Housing Units Gender Specific"

This argument assumes too much from the plaintiffs' position regarding gender specific tasking. Male corrections officers began working in the housing units in female prisons back in 1985 at about the same time female corrections offi-

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[36] The female inmates put their arguments under seven major headings. Because the arguments are sometimes repetitious and more often than not are directed to what they believe is good corrections policy rather than what is required by equal opportunity laws, each of the points will not be discussed separately.

cers began working in male prisons. The introduction of female corrections officers in male prisons has been considerably less controversial than the obverse. Prison authorities over the years have not been as sensitive as they should be to the need to limit certain of the tasks in female prisons to female corrections officers. Females being viewed by males is qualitatively different than males being viewed by females. The MDOC learned this in the court cases; the settlement agreements establish this. Strip searches, observation of female inmates while undressed, and staffing of medical visits are all discrete tasks which should be limited to female corrections officers as is transport under some circumstances. Pat down searches are of the same order. The Securior study supports gender specific task assignments. All this, however, does not make out a case for gender specific assignment of CO's and RUO's in the housing units and plaintiffs' willingness to accept the principle of gender specific tasks does not mean they concede the MDOC's position. What all this means is that the MDOC should be using a scalpel rather than a meat ax approach to staffing tasks in the female prisons.

C. "Assigning Males To Housing Units Solely to Achieve General Neutrality In Employment And Without Regard To Gender Differences Has Proven To Be A Mistake"

First, the record does not support a finding that the MDOC, in assigning male CO's and RUO's to the housing units in the female prisons, is engaged in some kind of affirmative action program or that there are not problems associated with the presence of male CO's and RUO's in the housing units in the female prisons.

The court cases were precisely about the problems associated with the presence of male corrections officers in the female prisons and the failure of the MDOC to recognize that it should not deal with cross gender supervision in the female prisons in the same manner as in the male prisons.

The female inmates are correct when they say:

> Male and female prisoners handle situations quite differently. There are security concerns with males that are not present with females. Gladwin, TR I, p. 104. There is a big difference in operating male and female institutions. All the literature describes how women handle incarceration differently. They enter prison with different issues than men and respond to authority differently. Women are more emotional and cry more easily than men, while men are more methodical and calculating. I-D Exh. 19, *Special Report on Female Offenders in Florida*, pp. 3-4, 8, 10. Women are more vocal about their complaints, but with women, staff do not have to worry about assaults, killings, and homemade weapons. Women also have different emotional needs. Many are mothers 'worried sick about their children.' Many have drug dependency issues. A large number of women report abuse of some form—sexual, physical, and verbal.

These phenomena are well known in corrections. Yet they have not resulted in any effort nationally to take male corrections officers out of female prisons. Rather, as previously discussed, there is simply no support for the position that the phenomena cannot be dealt with the presence of males in female prisons.

What can be drawn from this is that:

> —the change in policies and procedures occasioned by the settlement agreements must be given an opportunity to take hold
>
> —some care must be taken in which particular tasks are assigned as CO's and RUO's in the female prisons. Psychological screening of prospective employees should be instituted. (The record does not support MDOC's position that it is not effective but rather suggests psychological screening should be used.)

What the female inmates urge as policy is better directed to the ACA and to the Congress and the state legislature. What the female inmates ask for is essentially a political question and not a legal requirement.

D. "MDOC Is Obligated To Take All Reasonable Steps To Prevent Abuses From Continuing In The Female Prisons"

No one disputes this. This is what the court cases were all about. Nothing dramatically different occurred following the signing of the settlement agreements to cause the need for a sea change in staffing policy which would be the consequences of selective classification. McManus and Yukins each changed their minds it is true; their reasons for doing so does not pass muster. The reason for this case is that Martin became director and he came to the position with a stereotypical view of the role of sex in employment in male and female prisons: males guard males and females guard females. Without consulting his staff and without a review of internal studies, national policies or the literature Martin, and Martin alone, decided the change was appropriate and the MDOC staff fell in line. Martin had no qualifications from past training employment or experience to make a reasoned judgment on the subject and his leaving corrections as a profession simply confirms this.

E. "Making Gender A BFOQ For Female Housing Unit Officers Is Reasonably Necessary To Achieve MDOC's Core Mission"

In making this argument, the female inmates do not define the MDOC's core mission. Rather, referring to selective bits of trial testimony they argue that the steps required to be taken by the settlement agreements and the changes in physical environment in the female housing unit are insufficient to assure that not only will there never be an act of sexual misconduct, sexual harassment or overfamiliarity but that

there will never be an allegation of improper interaction. Again, the statistics do show a dramatic drop in the allegations of sexual misconduct. In reality, the statistics are not sufficiently discrete to make a finding about the significant allegations of sexual harassment or overfamiliarization. What is known only is that no staff member of MDOC except Martin and Yukins have expressed an opinion of the need to exclude male CO's and RUO's from the female prisons.

XII. National Profile of Corrections Officers in Female Prisons

At the request of the Court shortly after the case was filed, the MDOC surveyed the other 49 states and the Federal Bureau of Prisons for information regarding the staffing of housing units in female prisons. Forty-eight states and the Bureau of Prisons responded. The results of the survey follow:

—In four states corrections officer positions in the housing units are limited to female corrections officers

—Twenty-six states have a requirement that a minimum number of female corrections officers be available to perform selected tasks

—Twenty-two states have no minimum required number of female corrections officers

—Thirty-one states have gender-specific assignment for certain tasks such as transportation runs, strip searches, urine collection and medical appointments.

XIII. Conclusion

After all is said and done, the Court's view of the fundamental principles which must be balanced, as stated on March 23, 2001 at the conclusion of the proofs, still obtain:

> —there is no justification for a blanket ban on employment of male corrections officers in the female prisons in Michigan[37]
>
> —The MDOC has the right to limit certain tasks in the female prisons to female corrections officers, particularly to ensure female inmates' rights to privacy bearing in mind at all times the security interest of the corrections officers.

The fundamental difficulty with the MDOC's decision to ask the DCS for a BFOQ requirement for the CO and RUO's in the housing units in the female prisons is that the decision reflected neither reasoned decision making nor professional judgment, but rather the consequence of a belief of one person, not a correctional professional, in a transitory position of authority, that it was best for the female prisons in Michigan. There was no consultation with staff and no effort to follow established procedures. Indeed, the established procedures were amended to avoid scrutiny by the state agency which is statutorily charged with review such requests. The end result to all of this was to make what should have been a reasoned policy decision into a judicial dispute. This was wrong.

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[37] Today approximately 30% of the correctional officers in the male prisons in Michigan are female. To have one policy in male prisons and another in female prisons regarding cross-gender supervision suggests stereotyping beyond the confines of prison operation policies. *See* Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping A Feminist Legal Theory Approach To Privacy In Cross—Gender Prison Searches*, 4 Buffalo Crim.L.Rev., 861 (No. 2) (2001).

There are tasks in the running of a female prison as has been explained above which should not be performed by male corrections officers such as strip searches and body cavity searches. It should not be difficult to define these tasks and adjust CO and RUO duties in the housing units in the female prisons accordingly. Nothing in the decision here to deny the BFOQ's requirement should be read to prohibit the MDOC officials from making gender specific task assignments. The vast majority of female prisons in the United States appear to manage their populations safely and efficiently and still comply with the requirements of equal employment opportunity laws. Nothing in the record here suggests the MDOC can not do the same thing.

Lastly, it should be clear that this decision recognizes, as stated in *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), and most recently reaffirmed in *McKune v. Lile*, 586 U.S. —, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002):

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

This principle has not been violated here. A past director of the MDOC made a decision and tried to translate the decision into a courtroom judgment. The effort failed because the decision was contrary to law. This is not a circumstance where the Court is being asked to accord deference to the decision of prison authorities but rather a circumstance where the Court must balance the decision of prison authorities against the

equal employment opportunity requirement of the law. The state of Michigan has an established procedure for engaging in such balancing. Here, there was not only a bypass of that procedure but the absence of any evidence that the prison authorities made any attempt at balancing. It is for all of these reasons that plaintiffs are entitled to the declaratory relief they request.

DECLARATORY JUDGMENT

For the reasons set forth in the Decision entered this date, finding in favor of plaintiffs on their request for declaratory relief, IT IS ORDERED, ADJUDGED AND DECREED that gender-based assignments to the Corrections Officer positions and Resident Unit Officer positions at the Scott Correctional Facility, Western Wayne Facility, and Camp Brighton Facility constitute gender based discrimination in violation of Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and Section 207 of Michigan's Elliot-Larsen Civil Rights Act, M.C.L. § 37.2202.

Exhibit H

MICHIGAN CIVIL RIGHTS COMMISSION

Michigan Department of Civil Rights—
Office of Legal Affairs
1200 Sixth Street
Detroit, Michigan 48226
(313) 255-2998 FAX: (313) 255-1549

APPLICATION FOR BONA FIDE OCCUPATIONAL QUALIFICATION EXEMPTION

An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

Pursuant to Section 208 of the Elliott-Larsen Civil Rights Act, a person subject to Article 2 may apply to the Michigan Civil Rights Commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the business or enterprise. Upon sufficient showing, the commission may grant an exemption to the appropriate section of Article 2. Prior to requesting an exemption, employers must explore alternatives for the purpose of determining that no reasonable alternatives are available. However, an exemption will not be granted if the same facts and circumstances are at issue in a complaint pending before the deportment or commission.

To request a BFOQ exemption and begin the review process, complete this application, attaching additional pages if necessary. A legal brief in support of the BFOQ is also required and should minimally include: (1) background information and an explanation of the facts you believe justify the

BFOQ exemption(s), (2) an in depth analysis of the case law as it pertains to your specific request(s), and (3) proposed findings of fact and conclusions of law. You may also submit other supporting materials for consideration.

Upon receipt of all required documents, your BFOQ request will be assigned to the next Commissioner available on the (blind draw) assignment roster. The assigned Commissioner and legal staff will then review the application for adequacy. The Commissioner assigned will also determine if notice to employees, employee representatives or other interested parties is appropriate.

The completed application, and other requested materials should be returned to:

Sylvia J. Elliott
Michigan Department of Civil Rights
Office al Legal Affairs
1200 Sixth Street, 7th floor N
Detroit, Michigan 45226

1. Name of employer or entity seeking a bona fide occupation exemption.

2. Address and telephone number of principal location or place of business.

3. Addresses of all ether locations within the State of Michigan.

4. Describe in detail the entity's functions, operations and purposes.

5. Location, or locations, for which an exemption is sought.

6. Check basis for the BFOQ exemption:

( ) - Religion ( ) - Age ( ) - Sex

( ) - National Origin ( ) - Height ( ) - Weight

7. Title and description of position(s) for which exemption is sought.

8, Total number of positions in this classification for which exemption in being requested.

9. How long has this classification been used?

10. How many current employees, if any, are affected by this exemption?

11. Describe in detail why a bona fide occupational qualification is *necessary* to the normal operation of the business or enterprise. Also discuss any compelling reason(s) why persons in the group for which exemption is sought, should be exempted, or could not reasonably perform the duties of the position.

12. If the request for exemption is denied, please explain any possible alternatives which may be used and any others which the entity may have explored.

13. Have any civil rights complaints been filed against the entity, on the basis for which a BFOQ is requested, *i.e.* sex, age, etc.? If yes, list each and give the present status and the name of the local, state or federal civil rights agency involved.

14. Please complete the attached personnel survey. If you are subject to the EEOC reporting system, you may substitute your most recent answer as provided on the EEO-1 Reporting Form in lieu of completing the attached form.

_____

Signature Date

_____

Title

Disposition:

( ) – Approved

( ) – Rejected

Michigan Civil Rights Commission

By: _____ _____

Signature of Designated Representative Date

_____

Title

Comments—(including basis for rejection if applicable)

PERSONNEL SURVEY

WORK FORCE BREAKDOWN: DATE:

			MALE EMPLOYERS				FEMALE EMPLOYERS					
			Minorities				Minorities					
Job Categories	Total Males	Black	SSA	Asian	Am. Ind.	Total Females	Black	SSA	Asian	Am. Ind.	Total All Employees	Total All Minorities
Officials and Managers												
Professionals												
Technicians												
Sales Workers												
Office and Clerical												
Craftsmen (Skilled)												
Operatives (Semi-Skilled)												
Laborers (Unskilled)												
Service Worker												
TOTAL												

Race/Ethnic Designations: ALL All employees in unit, MIN Total employees in minority groups, BLACK Black employees, SSA Hispanic employees, ASIAN Asian American employees, AM. IND. American Indian employees